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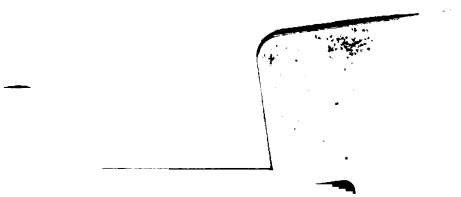

ACT OF STATE IN ENGLISH LAW

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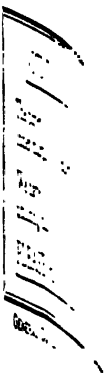

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TABLE OF CASES

A

PAGE

A. G. *v.* Hallett (1846), 15 M. & W. 97 46
—— Weeden & Shales (1699), Parker, 267 . . . 138
Anon (1682), 1 Vern. 120 28
Austria, Emperor of, *v.* Day & Kossuth (1861), 3 De G. F. & J. 217 . . . . . 28, 112, 148

B

Bankers' Case 24
Barclay *v.* Russell (1797), 3 Ves. 423 . . 153, 157, 160, 162, 170
Barnett, *In re* (1902), 1 Ch. 847 100
Bates's Case (1606), 2 St. Tr. 371 . . . . 9, 12, 49
Bellamont's Case, 2 Salk. 625 46
Berne, City of, *v.* Bank of England (1804), 9 Ves. 347 . . 37, 162
Blackburn *v.* Thompson (1812), 15 East, 90 . . . 37
Blad's, Peter, Case (1673), 3 Swanston, 603 . . . 25
Bode's, Baron de, Case (1851), 3 H. L. C. 449 . . . 132
Brown *v.* U. S. (1814), 8 Cranch, 110 138
Brunswick, Duke of, *v.* King of Hanover (1844), 6 Beav. 1; (1848), 1 H. L. 1 . . . . . 37, 40, 117, 121
Buron *v.* Denman (1848), 2 Ex. 167 . . . 42, 46, 94

C

Cameron *v.* Kyte (1835), 3 Knapp, 341 81
Campbell *v.* Hall (1774), Cowper, 204 . . . . 80, 174
Carr *v.* Fracis Times & Co. (1902), A. C. 176 . 37, 120, 122, 123
Castioni, *In re* (1891), 1 Q. B. 149 . . . . 115, 116
Cawdry's Case 13
Cawthorne *v.* Campbell, 1 Anst. 205 46
Chambers *v.* Jennings (1702), 1 Mod. 125 . . . 11
Charkieh (1873), L. R., 4 A. & E. 59 33
Cherokee Nation *v.* State of Georgia, 5 Peters, 1 . . . 109

PAGE

Chinese Exclusion Case, 130 U. S. 581 . . . 43, 83, 134
Christian County Court *v.* Rankin, 87 American Decision, 507 117
Churton *v.* Wilkin, W. N. (94), 62 46
Commendum, Case of 7
Cook *v.* Sprigg (1899), A. C. 572 . . . 78, 82, 132, 175
Cooper, *In re* (1891), 143 U. S. 472 . . 36, 80, 83, 101, 134
Coorg, Rajah of, *v.* East India Co. (1860), 29 Beav. 300 . 106, 116

D

Darnel's Case, 3 St. Tr. 36 . . . . . 10, 13
Dawkins *v.* Lord F. Paulet (1869), L. R. 5, Q. B. 94 . . 98
—— *v.* Lord Rokeby, L. R. 7, H. L. 744 . . . 98
Debs, *In re* (1894), 158 U. S. 564 30
De Haber *v.* Queen of Portugal (1851), 17 Q. B. 196 . . 43
Diego, Don, *v.* Bingley, Hob. 78 153
Direct United States Cable Co. *v.* Anglo-American Telegraph Co. (1877), 2 App. Cas. 394. 35
Dobree *v.* Napier (2 Bing. N. C. 781) 122-125
Doe d. Legh *v.* Roe (1841), 8 M. & W. 579 . . . 46
Dolder *v.* Huntingfield (1805), 11 Ves. 283 . . 38, 158, 161
Doss *v.* Secretary of State for India (1875), L. R. 19 Eq. 509 . . . . . 80, 107, 171, 172, 178
Dutton *v.* Howell (1694), Shower's "Parliamentary Cases," 24 67

E

E. I. Co. *v.* Syed Ally (1827), 7 Moo. Ind. App. 555 . . 106
Elphinstone *v.* Bedreechund (1830), 2 St. Tr., N. S. 379 62, 75, 105
Entick *v.* Carrington (1765), 19 St. Tr. 1030 . . . 22
Esposito *v.* Bowden (1857), 7 E. & B. 781 . . . 39

F

Felkin *v.* Lord Herbert (1861), 1 Dr. & Sm. 608 . . 45, 129
Ford *v.* Surget (1878), 97 U. S. 594 117
Forrester *v.* Secretary of State (1872), L. R. Ind. App. Supp. Vol. p. 10 106
Foster *v.* Globe Venture Syndicate (1900), 1 Ch. 811 . . 33
—— *v.* Neilson (2 Peters, 253) 26
Franconia, The (1876), 2 Ex. Div. 1 34

G

PAGE
Georgia, State of, *v.* Stanton (1867), 6 Wall, 50 . . 109
Gibson *v.* East India Co. (1839), 5 Bing. N. C. 273 . . 103, 104
Gladstone *v* Ottoman Bank (1863), 1 H. & M. 505 . . 139
Godden *v.* Hales (1686), Shower, 475 21
Grant *v.* Secretary of State for India in Council (1877), 2 C. P. D. 445 . . . . . 104, 107

H

Hampden's Case, 3 St. Tr. 825 . . . . . 23, 61
Hart *v.* Gampach (1872), L. R. 4 P. C. 439 . . . 121
Hawley *v.* Steele (1877), 6 Ch. D., 528 . . . 62
Hill *v.* Bigge, 3 Moo. P. C. 465 . . . . 69, 72, 73
Holyoake Water Power Co. *v.* Connecticut River Co., 22 Blatchford, 131 113
Hullett *v.* King of Spain (1828), 2 Bligh, N. S. 31 . . 146

I

India, Secretary for State in Council, *v.* Kamachee Boye Sahaba (1859), 13 Moo. P. C. 22 . . . . 2, 41, 100, 106

J

Jacobs *v.* Crédit Lyonnais (1884), 12 Q. B. D., 589 . . 140
Janson *v.* Driefontein Gold Mines (1900), 2 K. B. 339 . 38
Jones *v.* U. S. (1890), 137 U. S. 202 36

K

Kansas, State of, *v.* State of Colorado (1901), 185 U. S. 125 101, 113
Kentucky *v.* Dennison (24 Howard, 66) . . . 109
King, The, *v.* Louw (1904), A. C. 412 117
—— *v.* Williamson (1672), Freeman, 39 . . . 138

L

Little *v.* Barreme, 2 Cranch, 177 102
London, Mayor, etc., of, *v.* Bennet, 6 Car, 1 . . . 25
Louisiana *v.* Jumel (1882), 107 U. S. 711 . . . 46
Luby *v.* Lord Wodehouse (1865), 17 Ir. C. L. Reports, 618 . 71
Luther *v.* Borden (1849), 7 Howard, 1 51

M

PAGE
Machado *v.* Fontes (1897), 2 Q. B. 231 122
Manilla, The (1805), 1 Edwards Adm. Reports, 1 . . 37
Marais, *Ex parte* (1902), A. C. 109 . . 39, 43, 54, 58, 59, 63
Mennier, *In re* (1894), 2 Q. B. 415 116
Mighell *v.* Sultan of Jahore (1894), 1 Q. B. 149 . . 34, 37
Milligan, *Ex parte* (1866), 4 Wallace, 1 . . . 43, 54, 58, 62
Missouri *v.* Illinois and the Sanitary District of Chicago (1900), 180 U. S. 208 . . . . . 110, 113
Mitchell *v.* Harmony (1851), 13 Howard, 115 . . . 51, 53
Morcom *v.* P. M. G., Journal of Comp. Leg. Dec. 1900, 514 . 61
Mostyn *v.* Fabrigas (1774), Cowper, 161 . . . 69, 72
Mouse's Case, 12 Rep. 62 48
Musgrove *v.* Pulido (1879), 5 App. Cas. 102 . . . 73
—— *v.* Toy (1891), A. C. 272 . . . . . 95, 99

N

Nabob of the Carnatic *v.* East India Co. (1791), 1 Ves. Jr. 371 . . . . . 40, 41, 105, 106, 153
Napier, *Ex parte*, 21 L. J. Q. B. 332 104
Nireaha Tamaki *v.* Baker (1894), N. Z. 12 L. R. 483 . . 134
Non obstante, Case of, 12 Rep. 18 21

O

Ogden *v.* Folliott (1789), 1 H. Bl. 123; (1790), 3 T. R. 726 141, 145

P

Parlement Belge, The (1880), 4 P. D. 129; 5 P. D. 197 38, 87, 137
Pelican, The, 1 Edwards Adm. Rep. Appendix D . . . 37
Penn *v.* Baltimore 108
People, The, *v.* M'Leod (1841), N. Y. Hill, 377 . 43, 126, 129
Peru, Republic of, *v.* Dreyfus (1888), 38 Ch. D. 348 . 37, 162, 168
—— *v.* Peruvian Guano Co. (1887), 36 Ch. Div. 489 . . 168
Phillips *v.* Eyre (1869), L. R. 4 Q. B. 225; 6 Q. B. 1 . . 69, 72
Poll *v.* Lord Advocate (1899), 1 Fraser, 823 . . . 94
Prohibitions, Case of, 12 Rep. 64 11

Q

Quinn *v.* Leatham (1901), A. C. 495 . . . 98

R

PAGE
R. *v.* Brailsford (1905), 2 K. B. 730 156
—— *v.* Carew, 3 Swanston, 670 27
—— *v.* Commissioner of Customs (1836), 5 A. & E. 380 . 46
—— *v.* de Berenger (1814), 3 M. & S. 67 . . . 38
—— *v.* Keyn, 2 Ex. D. 1 125
—— *v.* Lesley (1860), 29 L. J. M. C. 97 . . . 124, 125
—— *v.* Lords Commissioners of the Treasury (1872), L. R. 7 Q. B. 387 45
Rhode Island *v.* Massachusetts, 12 Peters, 657 . . . 108
Ruck *v.* Williams (1858), 27 L. J. Ex. 357 . . . 105
Rundle *v.* Delaware and Raritan Council, 1 Wallace, Jr. 275 . 113
Rustomjee *v.* The Queen (1876), L. R., 1 Q. B. 487; 2 Q. B. 69 132, 133, 136

S

Salig Ram, Rajah *v.* Secretary of State (1872), L. R. Ind. App. Supp. Vol. 119 106
Saltpetre, Case of, 12 Rep. 12 48
Ship-money, Case of, 3 St. Tr. 904 48
Sicilies, King of the Two, *v.* P. & O. Co. and Willcox (1850), 19 L. J. N. S. 202 162
Sirdar Bhagwan Singh *v.* Secretary of State (1874), L. R. 2 Ind. App. Cas. 38 106
Southampton and Itchin Bridge Co. *v.* Southampton Local Board (1858), 8 E. & B. 811 105
Sparhawk *v.* The Republic, 1 Dallas, 357 . . . 51
Sprigg *v.* Sigeau (1897), A. C. 238 77
Stanley *v.* Wild (1900), 1 Q. B. 256 46
Stock *v.* Denew (1697), 1 Ca. Ch. 305 . . . 24, 85, 137
Sullivan *v.* Earl Spencer (1872), 6 Ir. R. Com. Law, 173 . 71, 72
Sutton *v.* Johnstone (1786), 1 T. R. 493 . . . 64, 98

T

Tandy *v.* Lord Westmoreland (1792), 27 St. Tr. 1246 . . 70, 72
Taylor *v.* Barclay (1828), 2 Simons, 213 . . . 33
—— *v.* Morton, 2 Curtis, 454 135
Teira Te Poea *v.* Roera Tareha (1896), N. Z. 15 L. R. 91 . 134
Thayer *v.* Brooks, 17 Ohio, 489 113
Tivnan, *In re* (1864), 5 B. & S. 645 116
Troner *v.* Hassold (1678), 1 Ca. Ch. 173 . . 24, 85, 86, 137

U

PAGE
U. S. *v.* Lee, 106 U. S. 196 47
—— *v.* M'Rae (1867), L. R. 4 Eq. 327; 3 Ch. 79; 8 Eq. 69 165, 177, 178
—— *v.* Pertcheman, 7 Peters, 51 83
—— *v.* Prioleau (1866), 35 L. J. Ch. 7 . . 154, 164, 177, 178
—— *v.* Rauscher, 119 U. S. 407 . . . . 102, 109
—— *v.* Repentigny (1866), 5 Wallace, 211 . . . 83, 176
—— *v.* Texas (1892), 143 U. S. 621 109

V

Vavasseur *v.* Krupp (1878), L. R. 9 Ch. Div. 359 . . 126
Veer Rajundar Wadeer *v.* East India Co. (1860), 30 L. J. Ch. N. S. 226 116
Venture Syndicate 33

W

Wadsworth *v.* Queen of Spain (1851), 17 Q. B. 215 . . 43
Walker *v.* Baird (1892), A. C. 491 . . 27, 87, 89, 92, 137
Ware *v.* Hylton, 3 Dallas, 199 83
Watts *v.* Kinney, 6 Hill, N. Y. 82 113
West Rand Central Gold Mining Co. *v.* The King (1905), 21 Times Law Reports, 562; [1905], 2 K. B. 391 80, 172, 176, 178
Weymberg *v.* Touch (1669), 1 Ca. Ch. 123 . . 24, 85, 137
Whitelock's Case (1613), 2 St. Tr. 765 . . . . 8, 10, 12
Williams *v.* Bruffy (1877), 96 U. S. 176. 117
—— *v.* Suffolk Insurance Co., 13 Peters, 415 . . . 36
Wi Parata *v.* Bishop of Wellington, 3 N. Z. Jurist, N. S. S. C. 72 134
Wisconsin *v.* Pelican Insurance Co., 127 U. S. 288 . . 110
Witham *v.* Dutton (1688), 3 Mod. 160 67
Wolff *v.* Oxholm (1817), 6 M. & S. 92 . . . . 141, 143
Wright *v.* Nutt (1788), 1 H. Bl. 136 . . . . 141, 144
—— *v.* Simpson (1802), 6 Ves. 740 . . . 145

TABLE OF CONTENTS

SECTION		PAGE
	TABLE OF CASES	v
	INTRODUCTION	1
I.	MATTER OF STATE IN THE SEVENTEENTH CENTURY	5
II.	MATTER OF STATE IN MODERN LAW	32
III.	FACTS OF STATE	33
IV.	MATTER OF STATE AS THE MATTER IN ISSUE	40
V.	THE CROWN AND ITS AGENTS	45
VI.	MARTIAL LAW	48
VII.	THE COLONIES AND DEPENDENCIES OF THE CROWN	66
VIII.	THE EXECUTION OF TREATIES	84
IX.	ALIENS	93
X.	DIRECT EXTERNAL RELATIONS OF STATES	100
XI.	CIVIL DISCORD IN FOREIGN COUNTRIES	115
XII.	ACTS UNDER THE AUTHORITY OF A FOREIGN SOVEREIGN	120
XIII.	TREATIES AS SOURCES OF RIGHT	132
XIV.	TREATIES IN RELATION TO CONTRACTS AND PRIVATE DEBTS	136
XV.	DISCHARGE OF OBLIGATIONS BY THE AUTHORITY OF A FOREIGN SOVEREIGN	139
XVI.	ACTIONS BY FOREIGN SOVEREIGNS	146
XVII.	SUCCESSION TO STATE RIGHTS AND LIABILITIES	157

ACT OF STATE IN ENGLISH LAW

INTRODUCTION

THE following pages are an attempt to deal in as systematic a way as the subject will permit, with a matter which lies outside the beaten track of English Law. "Matter of State" is not a familiar term in modern legal phraseology, and has a somewhat different signification now from that which it had in the seventeenth century. Then, "matter of State" might well be matter of law, but one of the several distinct and exclusive systems which, according to one school, went to make up the law of England; there is talk of a "law of State" and a "court of State" outside the Common Law and the Common Law Courts. But in modern times, "matter of State," much restricted in its scope, connotes that the relation to which it applies is not one of law, or, at any rate, of municipal law. The type of "matter of State" is the matter *between* States, which, whether it be regulated by international law or not, and whether the acts in question are or are not in

accord with international law, is not a subject of municipal jurisdiction.

"The transactions of independent states between each other are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make" (*Secretary of State for India in Council* v. *Kamachee Boye Sahaba* [1859], 13 Moo. P. C. 22, at p. 75). But there is a troublesome borderland of law and politics. On the one hand, out of the relations of independent States there may spring rights and duties in municipal law; on the other, international relations may sometimes overwhelm clear matters of individual right or liability. In either case, there will be grave questions as to when these consequences do happen. Finally, there are some matters of State, or suggested matters of State, which cannot be brought within the general principle above stated. Often in the following pages it will be necessary to follow up for a time subjects which are not matter of State at all, but are sufficiently close thereto to demand attention. A very large proportion of the cases in which matter of State has been considered, are cases which have arisen in or in relation to some of the Colonies; one phase of "matter of State" is closely connected with the status of colonies acquired by cession or conquest. Practically, it is impossible to keep separate those matters whereof the law-

fulness or unlawfulness, validity or invalidity, is outside the consideration of Courts of Justice, and these matters wherein the Crown, or its instrument, claims, or is conceded, an unfettered discretion under the Constitution.

Although matter of State fills a very small space in our system, there have been, during the last few years, a number of cases in which it has been considered in our Courts. In three cases from South Africa—*Cook* v. *Sprigg* [1899], A. C. 572; *Sprigg* v. *Sigcau* [1897], A. C. 238, and *ex parte Marais* [1902], A.C. 109, the matter has been under consideration in the Privy Council; and in *Carr* v. *Fracis Times & Co.* [1902], A. C. 176 in the House of Lords. A few years further back the subject was very fully discussed in *Walker* v. *Baird* [1892], A. C. 491, on appeal from the Supreme Court of Newfoundland, and in *Musgrove* v. *Toy* [1891], A. C. 272, on appeal from the Supreme Court of Victoria. The elucidation of the matter in the last case did not prevent the Government of Victoria in 1901 from asking the Imperial Government for its sanction to drastic measures, proposed to be taken by way of "act of State" in regard to a libel on the King, published in the State. On the other hand, there seem to have been suggestions in learned journals that the attack of the Baltic Fleet on the North Sea fishermen might be the subject of civil or criminal proceedings in English courts in case the agents should come within the British jurisdiction

(see 18 Harvard Law Review, p. 304, citing 68 J. P. 529). Last of all, we have the important questions raised and decided in the King's Bench Division in *West Rand Central Gold Mining Co.* v. *The King* ([1905], 2 K. B. 391), wherein the Court was called on to determine whether the matter in question fell within the rights and liabilities to which a new government comes by way of succession, or whether the claim was a matter of State lying outside the consideration of Courts of Justice altogether.[1]

[1] It may not be impertinent to state that this essay was all but completed before any report of this case reached Australia.

I

MATTER OF STATE IN THE SEVENTEENTH CENTURY

THE subject is one in which history is more than ordinarily important, and the critical period is the first part of the seventeenth century, though it was not until the Revolution of 1689 that the relations of the Courts of Law to matter of State were finally settled on their present basis. Questions as to the limits of royal power were, of course, not new in the reigns of Elizabeth and James I., but it was at that time that the prerogative and its nature was entering into the speculations of lawyers, and was taking shape in their hands. Hallam (cap. v.) says:—

"There was a notion very prevalent in the Cabinet of Elizabeth, though it was not quite so broadly or so frequently promulgated as in the following reigns, that besides the common prerogatives of the English Crown, which were admitted to have legal bounds, there was a kind of paramount sovereignty, which they denominated her 'absolute power' incident as they pretended to the abstract nature of sovereignty, and arising out of its primary office of preserving the State from destruction."

Hallam compares this "absolute power" with the dictatorial power of the Roman Senate; among modern institutions it seems almost exactly to correspond with the much contested *acte de gouvernement* in French Law—acts of high power standing outside of, and above not only the ordinary judicial but also the administrative *régime*, and best described by our own term "act of State." But in the hands of Bacon and the lawyers of the Court, the matter of State over which the absolute power extended took a far wider range; and, indeed, if the first step be granted—that the King's absolute power extends to doing whatever he may think fit for the purpose of averting danger and establishing the safety of the realm—one may be surprised at the moderation which sets any limit to the subjects over which it may extend. This has been clearly enough perceived in modern France; and we learn that the test of intent or object (perhaps what we should call the motive) applied to *acte de gouvernement* is now discredited in favour of the intrinsic nature of the act (Berthélemy, "Droit Administratif," p. 105). Accordingly, we find that the *absolute prerogative*, though often stated in terms of an extraordinary power, substantially extends over and covers the whole prerogative of national government, and is equivalent to the "discretionary power of the executive." This danger was clearly seen in the Commons, when the Lords proposed an amend-

ment to the Petition of Right, "to leave entire that sovereign power wherewith your Majesty is entrusted for the protection, safety, and happiness of your people"; it would be said that the King had no ordinary power to imprison, or billet soldiers, or issue commissions of martial law, but that "he hath an extraordinary and transcendent sovereign power for the protection, etc., of his people; and so all these things when done hereafter will be said to be done by this power" (3 State Trials, 198). Practically, the distinction seems to be less between the King's extraordinary power and the ordinary power of executive government than between the governmental power on the one hand, and the ordinary course of justice with which go the property rights of the Crown on the other, though even here the distinction is sometimes obscured. The former is above, and is not restrained by common law; the latter is within the common law. This seems to be the meaning of the King's communication to the judges in the *Case of Commendam:*

"His Majesty had a double prerogative, whereof the one was ordinary, and had relation to his private interest, which might be, and was every day disputed in Westminster Hall; the other was of a higher nature, referring to his supreme and imperial power and sovereignty, which ought not to be disputed or handled in vulgar argument; but that of late the Courts of Common Law were grown so vast and transcendent as they did both meddle with the King's

prerogative and had encroached upon all other Courts of justice" (Spedding, "Letters and Life of Francis Bacon," vol. v. p. 363, and see also Cowell's "Interpreter," cited Prothero's "Constitutional Documents," pp. 409-411).

Again in the Speech in the Star Chamber on 16th June 1616, James opposes his absolute and his private prerogative:

"I desire you to give me no more right in my private prerogative than you give to any subject, and therein I will be acquiescent" (Prothero, p. 399).

As to the King's powers in relation to ordinary judicature, it is probable that James I. had certain views of prerogative peculiarly his own, which were not likely to find defenders even amongst the Crown lawyers. It is clear that neither in his reign or in that of Charles I. were the Crown lawyers bold enough to claim for the King a power to alter or interfere with the administration of the law relating to the mutual rights of subjects, where neither matter of State nor the King's interest intervened. Bacon's argument on the writ *De rege inconsulto* practically admits this by the distinctions which it seeks to establish; and it is stated very clearly by him in the proceedings against Whitelocke (1613, 2 State Trials, 765). At page 768, Bacon distinguishes between the King's grants and ordinary commissions of justice on the one hand, and the King's "high

commissions of regiment or mixed with causes of State" on the other.

"In the former, there is no doubt that they may be freely questioned and disputed, and any defect in matter or form stood upon, though the King be many times the adverse party. But for the latter, they are rather to be dealt with, if at all, by a modest and humble intimation or remonstrance to His Majesty and His Council than by bravery of dispute or peremptory opposition."

In the same case, the Commission of Inquiry into the affairs of the Navy, is distinguished as matter of State from "a Commission of Oyer and Terminer or such ordinary commission" ("Life and Letters of Francis Bacon," iv. 346, etc.).

The distinction is expressly drawn by Fleming, C.B., in the judgment in *Bates's Case* (1606, 2 State Trials, 371):

"The King's power is twofold—ordinary and absolute. His ordinary power is for the profit of particular subjects, for the execution of civil justice, the determining of *meum*; it is exercised by equity and justice in ordinary Courts, and by civilians is named *jus privatum*, with us, common law: it cannot be changed without Parliament. The absolute power of the King is applied for the general benefit of the people, and is *salus populi*, as the people is the body and the King the head; this power is properly termed policy or government, and as the constitution of the body varies from time to time, so varies this absolute law, according to the wisdom of the King for the common good. The matter in question (*i.e.* the laying of customs duties) is

material matter of State, and ought to be ruled by the rules of policy; and if so, the King hath done well to execute his extraordinary power."

So also Heath, A.G., in *Darnel's Case* (3 State Trials, 36-37):

"For the King cannot command your Lordships or any other Court of justice to proceed otherwise than according to the laws of this kingdom; for it is part of your Lordship's oath, to judge according to the law of this kingdom."

The Executive is not to interfere with the Judiciary in the matters within the exclusive sphere of the latter: that is admitted; but the question is—what is the proper sphere of the judiciary? That the King's writs and commissions issued in the ordinary course of justice are not protected as matter of State from examination in the Courts appears from the passages already cited from the proceedings against Whitelocke. But the powers of Courts are a delicate subject, coming very near to the mystery part of prerogative. The judges are to be careful to keep themselves to their own jurisdiction, and leave other Courts to theirs (James I., Speech in the Star Chamber, Prothero, 399). There is some reason for the view that, as all jurisdictions emanate from the King, so he is the great reconciler, determining what are their boundaries. Thus the King acts in the great conflicts between the Common Law Courts and the equitable

jurisdiction of the Chancellor, and between the King's Bench and the Ecclesiastical Courts (see the *Case of Prohibitions*, 12 Reports, 64, 65, and Gardiner, "Documents," 35). To dispute, even before the Chancellor, the authority of a tribunal set up by the King's commission will be deemed presumptuous, and may call down judicial censure. Whitelocke is arguing before Ellesmere against a demurrer which has set up the jurisdiction of the Earl Marshal's Court over the plaintiff's claim. His contention is that the law does not recognise such a Court;[1] that there may be a Court of the constable and marshal which, however, can only be constituted when there is a constable or commission for the office. Ellesmere wrathfully declared that it was too great a question for him to judge of, and that he would certify the King as to it. Whitelocke desired his Lordship "not to take it so," explaining that he was not questioning the King's power to grant a commission to keep a Court, but whether he had, in fact, given the power by his commission — "the validity of the commission as it was granted was only in question, and not the King's power in granting of it." "But this would not stop the Chancellor's mouth from inveighing at lawyers that studied prerogative."

The King's absolute power is above the

[1] This point was determined according to Whitelocke's contention by the Queen's Bench in *Chambers* v. *Jennings* (1702), 1 Mod. 125.

common law; but it is a *law*, nevertheless—public law, *lex terrae*.

"I consider therefore that it is a true and received division of law into *jus publicum* and *jus privatum*, the one being the sinews of property, the other of government."

This dictum of Bacon, and the observations of Chief Baron Fleming in *Bates's Case*, set out above, may indicate how far the Romanising influences of the sixteenth century, which Professor Maitland has noticed, have laid hold of our lawyers in the early seventeenth. At no other time in our history has the distinction between public and private law been so emphatically asserted in England; and here the cleavage between Government on the one hand and property on the other is asserted for no academic purpose of classification, but as a fundamental condition of political existence. *Jus privatum* marks the limits of common law. But the absolute power is *lex terrae*, if for no other purpose than meeting some inconvenient statutes. To refer again to *Whitelocke's Case*: Bacon informs us that in the opinion of the Council, the *lex terrae* mentioned in *Magna Charta* is "not to be understood only of proceedings in the ordinary Courts of justice; that His Majesty's prerogative and his absolute power incident to his sovereignty is also *lex terrae*, and is invested and exercised by the law of the land, and is part thereof" (Bacon, "Works," iv. 350-351).

Sergeant Ashley's argument in *Darnel's Case*, in 3 State Trials, 148, is to the same effect, where among the laws and jurisdictions outside common law, we find enumerated the ecclesiastical, admiralty, law martial, law merchant and "law of State."

"Infinite are the occurrences of State upon which the common law extends not. And if these proceedings of State should not be also accounted the law of the land, then we should fall into the same inconveniency mentioned in *Cawdry's Case*, that the King should not be able to do justice in all cases in his own dominions."

The same view is carefully worked out by Heath, A.G., in his argument in the same case. The *absoluta potestas* that a sovereign has by which he commands is not, he points out, "such a power as that a King may do what he pleaseth, for he hath rules to govern himself by" (3 State Trials, p. 37). But just as the Courts interpret and administer the ordinary laws of justice, and none can call them in question save by the appointed means of correcting error, so the King interprets and administers matter of State, and is the sole and final interpreter, for "who shall question the justice or action of the King who is not to give any account for them." It is for the subject merely to obey, and for lawyers and Courts, "We are too wise, nay, we are too foolish in undertaking to examine matters of State to which we are not born" (p. 48).

The extent of matter of State is declared by Bacon in the "Essay of Judicature":

"I call matter of State not merely the parts of sovereignty, but whatever introduceth any great alteration or dangerous precedent, or concerneth manifestly any great portion of people."

Any matter which the King and his Council may deem to be required *pro salute populi* is within its scope. Whitelocke's opinion against the validity of the commission on the Navy is denounced by the Council in that it would overthrow, "the King's martial power and the authority of the Council table and the force of His Majesty's proclamations, and other actions and directions of State and policy applied to the necessities of times and occasions which fall not many times within the remedies of ordinary justice, nor cannot be tied to the formalities of a legal proceeding *propter tarda legum auxilia*."

These statements can be taken by way of illustration merely; it will be for the King and his Council to determine what is matter of State, the power to be exercised and the occasion for it. The King and Council may issue either general or particular commands to subjects; and may punish offenders for breach thereof. As the flexible rule of equity bends the rigidity of common law in matters of *meum* and *tuum*, so the "general government of cases with reference to the common state of the kingdom is from the

Council Board, and these they are to vary from the law of the kingdom," *i.e.* the common law (per the Lord Keeper, in his Address to both Houses of Parliament by the King's command, 3 State Trials, 172). The appropriate tribunal is the Star Chamber or the Council; and before it may be brought all who disobey, or resist, or otherwise contemn the royal authority. The invocation of the ordinary legal remedies against alleged invasion of right by the Council's authority is a grave offence; and the Council may intervene peremptorily to stay the proceedings. In 1596 we find the Council ordering a stay of proceedings in the Common Pleas against an officer of the Northern Council, sued by one whom he had arrested in pursuance of the orders of the Council, and the plaintiff is ordered to find security to answer before the Council for his contempt (Dasent, "Acts of the Privy Council," 1596, p. 468). Later (p. 485), we find an entry that the Chief Justice is ordered to enjoin the councillors, attorneys, and solicitors who have assisted the plaintiff that it is not for them to meddle in such cases to the derogation of His Majesty's commissions. This case well illustrates the possible "interveniency" of matter of State in ordinary civil proceedings. It is, in fact, abundantly clear that at the end of the reign of Elizabeth the Council was active in staying proceedings in the Courts of law, civil and criminal, for reasons of State, or forasmuch as

they concerned Her Majesty. Thus, to take a few cases at random from the most recently published volumes of the "Acts of Council," in 1595 we find an action in the King's Bench against one who had ordered powder for the service of the Navy, stayed until such time as the matter may be examined, and Her Majesty moved that some course may be taken for the payment of the money (p. 317); stay of proceedings at the request of the "Duke of Bullion" (Bouillon) against French fishermen detained in Norfolk for a fracas with English fishermen (p. 333); and stay of proceedings against one who is a prisoner of war in the hands of the enemy (p. 397).

Bacon's famous argument on the writ *De non procedendo rege inconsulto* assumes rather than contends for a power to withdraw from the Courts cases which are "of point of State"; his argument is that the power is not limited to such cases, and extends even to matters of profit to the King. Having cited precedents in which proceedings have been stayed on the writ, he explains that these cases are not within the prohibition of 1 Edward III. against a stay or denial of justice upon the King's letter, "for that was meant in respect of letters and consideration of favour between party and party, and not of mandates of State or upon legal interest in the King"; and he adds, "It may be said that these cases seem to be but a case of point of State; but then take this with you, that the eye of the law of

England ever beholds the King's treasure and profit as matter of State, as it is indeed—they are the sinews of the Crown."[1]

What is the duty of the Court when matter of State discloses itself in the course of litigation? This may of course well happen in either civil or criminal proceedings as incident to the determination of some legal right or duty. In such a case the Court must communicate with the King for information and advice. The duty of consultation is, of course, the duty insisted upon by Bacon in his argument on the writ, *De rege inconsulto*, even in cases which without being obvious matters of State, involve some matter of legal interest in the King; and he states his theory very clearly in the "Essay of Judicature" ("Works," vi. pp. 507, 509):

"The office of judges may have reference to . . . the Sovereign or State above them. . . Fourthly, for that which may concern the Sovereign and estate. Judges ought above all to remember the conclusion of the Roman Twelve Tables; *Salus populi suprema lex:* and to know that laws, except they be in order to that end, are but things captious and oracles not well inspired. Therefore it is a happy thing in a State when Kings and States do often consult with judges; and again when judges do often consult with the King and State; the one when there is matter of law intervenient in business of State; the other when there is some consideration of State intervenient in matter of law. For many times the things deduced to judgment may be

[1] Bacon, "Works," vol. vii. p. 702.

meum and *tuum*, when the reason and consequence thereof may trench to point of estate: I call matter of estate not merely the parts of sovereignty, but whatsoever introduceth any great alteration or dangerous precedent, or concerneth manifestly any great portion of people."

So, the King to the judges:

"Encroach not upon the prerogative of the Crown. If there falls out a question that concerns my prerogative or mystery of State, deal not with it till you consult with the King or his Council, or both, for they are transcendent matters. . . . That which concerns the mystery of the King's power is not lawful to be disputed; for that is to wade into the weakness of princes, and to take away the mystical reverence that belong to them that sit in the throne of God" ("Works of James I.," cited Prothero, p. 399).

Matter of State may thus be dealt with in various ways. In its most direct determination and enforcement it belongs to the King and his Council; there is "always reserved a high and pre-eminent power to the King's Council in causes that might in example or consequence concern the state of the commonwealth." If a question of State arise as incident to the ordinary proceedings of a Court of justice, two courses are open—the consultation already referred to or withdrawal to the Council or the Chancellor. Bacon's view is plain:

"The writ is a mean provided by the ancient law of England to bring any case that may

concern your Majesty in profit or power from the ordinary Benches, to be tried and judged before the Chancellor of England by the ordinary and legal part of this power. And your Majesty knoweth your Chancellor is ever a principal councillor and instrument of monarchy, of immediate dependence on the King; and therefore like to be a safe and tender guardian of the regal rights."

It is useless to speculate upon the possible development of such a system; but it is very probable that these causes would have found their way to the Chancellor, and that in his "Court of State" there would have grown up a department of equity—to which, as we have seen, matter of State was sometimes likened—in which these causes should be determined not arbitrarily but according to law, modified by reason of State; that, as Mr Gardiner points out, we should have had our *juridiction administrative* and our *contentieux administratif*.

The other course is to leave the case to the Court in which it arises, but on the condition that the Court takes both the facts and the law of State from the King. That this is what is implied in consultation with the King is plain in James's communications with his judges; it is also insisted upon by the Crown lawyers and the judges in the case of ship-money. In that matter the question submitted to the judges is not merely whether the King might "when the good and safety of the kingdom in general is concerned

and the whole kingdom in danger, by writ under the Great Seal of England, command all the subjects of this his kingdom at their charge to provide and furnish such number of ships with men, victuals, and munition, and for such time as the King should think fit for the defence and safeguard of the kingdom, from such danger and peril, and by law compel the doing thereof in case of refusal or refractoriness," but also whether "the King is the *sole judge* both of the danger and when and how the same is to be prevented and avoided." These questions were answered in favour of the Crown, first by the judges in consultation, and later in the Exchequer Chamber.

The attitude of the prerogative lawyers towards the King's relation to statutes lies rather outside our present consideration. Cowell does indeed in the baldest terms state the doctrine of the absolute sovereignty of the King, unrestrained as to its objects (see Cowell's "Interpreter," passages cited Prothero, pp. 409-411). But without going this length, it was possible to argue that both in common law and in prerogative there was somewhat fundamental which was out of the reach of any Parliament; statutes are still instruments for solemn declaration and witness as to the law, rather than means of changing it, at any rate in its fundamental contents. Crown lawyers, like Finch in the case of ship-money, saw the *summa potestas* in matter of State in the King

himself and not in Parliament; and just as at a later day we see that Parliamentary sovereignty implies one limitation upon the power of any Parliament—that it cannot make any unrepealable law—so, in the case of the King, it might well be considered that the one thing in Government which the *summa potestas* could not accomplish was to impair the prerogative of the Crown. This doctrine of public law would be fortified by the view of the kingdom as an inheritance in which the King had merely a life interest, and not a fee simple. The decision in *Godden* v. *Hales* (1686, Shower, 475), whatever it is worth, in effect declares that in respect to the laws of government as distinguished from those of property, it is the King who is absolute sovereign, and that his power to dispense with such laws cannot be impaired by statute. In other words, part, at any rate, of the Constitution is beyond and above the power of Parliament (see also the case of *Non obstante*, 12 Reports, 18).

Of all this much was of course bitterly contested at the time, and all but a little now belongs to the past. The Revolution of 1689 established the sovereignty of Parliament. As early as the reign of Mary there was a solemn opinion of the judges, confirmed in the reign of James I., against the making of offences by proclamations (12 Reports, 76), but without stopping the flow of proclamations or the punishment of

new offences by the Star Chamber. The declaration that "the King hath no prerogative but what the law of the land allows him" is not conclusive against those who allege that the absolute prerogative is part of the law of the land. But to Englishmen, the "law of the land" means the common law, just as when men speak of the civil law they mean the civil law of Rome; as to the other laws — ecclesiastical, merchant, and the like—each of them may be *a* law of the land, but none of them is properly described as *the* law of the land (3 State Trials, p. 153). As for a "law of State" outside and above the common law, neither Prynne (3 State Trials, 193) nor Selden (9 State Trials, 76) knows such a law; and their declaration is echoed more than a century later, when, in *Entick* v. *Carrington* (1765, 19 State Trials, 1030), Lord Camden says:

"With respect to the argument of State necessity or a distinction that has been arrived at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinction."

Even in 1625 Sergeant Ashley's boldness in asserting that the King's power to imprison subjects was too high a matter for legal debate, led to his commitment by the House of Lords; and the liberty of the subject came definitely under the protection of the Courts when it

became established that commitment *per speciale mandatum regis* or by the Council was not a sufficient return to a writ of *habeas corpus*. Moreover, not merely is the jurisdiction of the Courts not ousted by the fact that the act was done under royal authority, but such authority is no defence unless the order was one which the Crown can lawfully give; this is now one of the commonplaces of the law. The act declaring the illegality of ship-money not merely prohibited the impost, but annulled the decision in *Hampden's Case*, and denounced the reasons of law and pretensions of State upon which it was based. It is no longer the averment of the King's expectancy of danger which determines the measures to be taken for the public safety, so far as those measures are in derogation of private right. It is the argument of Holborne and of Croke, J., which has prevailed—proved necessity and imminent danger furnish the occasion; the means lawful are equally referred to the necessity of the case; and in each case necessity has to be determined by the Court. So much is true of time of peace; and rumours of war are not sufficient, as Littleton argued, to put the laws to silence. Whether the actual existence of a state of war carries us into a new atmosphere — that of Bacon and the Crown lawyers of the seventeenth century—where ordinary justice is superseded by a different system, and common law gives place to martial law, or

whether the state of war merely gives the occasion for applying the rule of necessity, is a matter upon which the last word has certainly not yet been said by English lawyers (see "Law Quarterly Review," vol. xviii. pp. 117-158; Dicey, "Law of the Constitution," 6th ed. p. 578, etc.).

The doctrine of evocation loses much of its importance by the restraint of the Council, and probably something from the abolition of the High Commission and the abeyance of the Ecclesiastical Courts. Still, even after the Restoration, there is a number of instances which remind us of the old powers of Council and Chancellor. Treaties of peace are enrolled in Chancery, which is regarded as giving the Court particular cognizance of that class of matters of State (see the cases of *Weymberg* v. *Touch* (1669), 1 Ca. Ch. 123; *Troner* v. *Hassold* (1678), 1 Ca. Ch. 173; *Stock* v. *Denew* (1697), 1 Ca. Ch. 305). The *Bankers' Case* presents the most notable instance of an appeal to Chancery on the "equity of public necessity." When the Exchequer was closed, the Bankers began to be pressed by their creditors; and it was resolved by the Government to attempt to protect them by injunctions against the prosecution of the actions. There were conferences between the law officers of the Crown and the Lord Keeper Bridgeman, but the latter showed himself restive both on this point and on the issue of a commission of martial law

as to which also the Government was anxious. Sir Orlando Bridgeman was accordingly displaced, and Shaftesbury became Chancellor. He, however, is said to have found the difficulty greater than he expected, and to have succeeded in postponing the matter, with the consequence that, according to Lord Campbell, it fell to his successor to determine. Beyond that I have been unable to trace the history of the matter.[1] Lord Nottingham, Shaftesbury's successor, held high views of his own powers and those of the Council in respect to litigation in matters of State. His MSS. record a very interesting case.[2] One Peter Blad, a Dane, had seized property of a British subject on the high seas as confiscate for fishing in the waters of Iceland in derogation of Letters Patent granted to Blad by the King of Denmark. Blad came to England and was arrested upon an action brought for the seizure. He thereupon petitioned the Council "to have all proceedings staid, and would make this a case of State." Lord Nottingham in the Council would not have it that it was a question

[1] See Campbell's "Lives of the Chancellors," vol. iii., Bridgeman, 285, Shaftesbury, 314; North's "Lives of the North's," vol. i. p. 181, and "Examen," p. 38. Campbell refers to "Reports in Chancery," i. 24; but the case reported there is forty years earlier than the incident he is discussing. The case is *Mayor, etc., of London* v. *Bennet* (6 Car. I.), in which injunctions were granted against persons bringing actions against the Corporation upon bonds issued by them as a means of floating a loan to the King. It would no doubt be a useful precedent for a Government all too ready to forget the lessons of the preceding reign as to "State necessity."

[2] *Peter Blad's Case*, 1673, 3 Swanston, 603.

of State; it was but a private injury, and it would be an injury to the subject to stay his suit, while it would be no injury to the Dane to let it go on, for "whatever was law in Denmark would be law in England in this case, and would be allowed as a very good justification in this action, but if the wrong was done without colour of authority it was fit to be questioned."

Subsequently the Dane appeared before the Lord Keeper in the Court of Chancery, and prayed for a perpetual injunction against the prosecution of the action.[1] The Englishmen answered that they had a right to trade under a treaty of peace between England and Denmark; and that any patent granted by Denmark would be illegal, if made before the peace, as being superseded by it, and if made after the peace, as being in derogation of it. Lord Nottingham then held that the Englishmen's own case clearly made it a case of State—

"For they insist upon the articles of peace to justify their commerce, which is of vast consequence to the public, for every misinterpretation of an article may be the unhappy occasion of a war; and if it had been known at the Board that this would have been the main part of their case, *doubtless the Council would not have suffered it to depend in Westminster Hall.* . . . The plaintiff hath proved Letters Patent from the King of Denmark for the sole trade in Iceland; a seizure

[1] *Blad* v. *Bamfield*, 3 Swanston, p. 604.

by virtue of that patent; a sentence upon that seizure; a confirmation of that sentence by the Chancellor of Denmark; an execution of that sentence after confirmation; and a payment of two-thirds to the King of Denmark after that execution. Now after that, to send it to trial at law, where either the Court must pretend to judge of the validity of the King's Letters Patent in Denmark, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd."

This case exhibits clearly enough the circumstances which in Lord Nottingham's opinion would suffice to transform facts *prima facie* cognizable as a tort into a matter of State outside the jurisdiction of Municipal Courts, and in the main would accurately describe the defence of act of State at the present day, though one of its reasons—that the matter involves the construction of treaties of peace—might now be regarded as insufficient (see *Walker* v. *Baird*, 1892, A. C. 491). But it will be noted that Lord Nottingham has no doubt of the power either of the Council or of the Chancery to stay proceedings in the Common Law Courts if those proceedings are "cases of State" within the comparatively narrow meaning which we may take it he assigned to the term. In 1682 he refers to the case with evident satisfaction, and declares that "cases of State" are most properly brought into Chancery (*Rex* v. *Carew*, 3 Swanston, 670), where a *scire*

facias is granted to repeal certain letters of marque, peace having been concluded with the Dutch—"a matter on which peace or war depended."

But one of the earliest decisions of Lord Nottingham's successor, Lord Keeper Guildford, is an express repudiation of the claim which Lord Nottingham makes for his Court. In Anon. (1682, 1 Vernon, 120), on a motion by the King's patentees for an injunction to stop the sale of English Bibles printed beyond the sea, it was urged that "this Court was a Court of State, and therefore for the great mischief that might arise from these Bibles if they were to be publicly sold, the sale ought to be prohibited by this Court on the public account," as well as to quieten the King's patentees in their possession.

The Lord Keeper: "I do not apprehend the Chancery to be in the least a Court of State; neither can I grant an injunction in any case but where a man has a plain right to be quieted in it."

Therefore, he concludes, there must be, in the first instance, a trial of this right at law.

The best if not the only modern instance of the tradition of Chancery as a Court of State enjoining matters outside legal right, is to be found in the case of *Emperor of Austria* v. *Day & Kossuth* (1861, 3 De G. F. & J. 217). In that case Stuart, V.C., granted an injunction against the manufacture of notes intended for circulation as currency in Hungary, on the grounds that the

defendant's acts were an impairment of the prerogative of the Sovereign of Hungary, and that the notes were to be used for the political end of aiding a revolution. On appeal, counsel for the plaintiff abandoned the political ground taken by the Vice-Chancellor, and rested his case on the pecuniary interest of Hungary and of its subjects, which the Emperor was competent to represent. It was held by the Lord Chancellor (Lord Campbell), and Knight Bruce, L.J., that the injunction might go for the interference with the rights of property of the Sovereign, "the fiscal resources, public revenues, and pecuniary means of Hungary," as well as for the losses suffered by Hungarian subjects whose interests the Emperor might represent. Turner, L.J., took a narrower view. He considered it was no part of the duty of the Court to protect the Emperor's prerogative, which stood "on the same footing as acts of State and matters of that description," and belonged to the department of political rights with which Courts disclaimed interference. But the case was decided in plaintiff's favour on the ground of injury to the subjects of plaintiff in their private rights.

Had Chancery really established a substantive jurisdiction in matters of State, it can hardly be doubted that it would have developed a powerful machinery auxiliary to the executive—the writ of injunction is eminently capable of use for such purposes. We are perhaps, even to-day, on the

threshold of an extension of the uses of injunction, which is causing not a little disquietude; and there is one notable case in the United States in which the Government got an offender attached for disobedience to an injunction in circumstances where it might not have been easy to get a conviction by a jury. *In re Debs* (1894, 158 U. S. 564) was a case arising out of the great railway strike. The defendant was an union leader, who for a few weeks enjoyed world-wide notoriety, and he was alleged to have contrived with others by threats, intimidation, force, and violence, to obstruct and wreck trains engaged in inter-state commerce, and in carrying the United States mails. An application was made for an injunction, which was granted, and the defendant was attached for disobedience. On motion for a writ of *habeas corpus*, the Supreme Court, supporting the injunction, denied that the only weapon of Government for preserving the peace of the nation was armed suppression and criminal prosecution.

"Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the Courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result" (p. 582).

While the Court of Chancery might have been

a ready auxiliary to the executive, it might, on the other hand, have been found competent to do some things for the subject which a modern English Court cannot do; the fact that it was a Court of Equity would have enabled it to make exactly that judicious mixture of law and discretion by which an Administrative Court can in certain cases reconcile justice to individuals with the public necessity. Our system of submitting questions between Government and citizens to the ordinary Courts is not in all things advantageous to the citizen. If it gives him remarkable protection against the exercise of governmental power, still, in a system which gives no redress against the State for tort, and, by narrowing the application of the ordinary principles of representation, barely recognises its liability for contracts made on its behalf, there is something to seek in that which concerns the State as juristic person.

II

MATTER OF STATE IN MODERN LAW

WHILE the contests of the seventeenth century were fatal to the larger pretensions of prerogative, there remains an ill-defined sphere in which matter of State may enter into the administration of the law. The question whether a given territory is independent or not; a given potentate, sovereign; whether there is peace or war—are all matters of fact upon which rights and liabilities may depend. Again, attempts are sometimes made to treat purely political transactions as titles to legal right and obligation; this tendency is perhaps encouraged by the growth of international law and the uncertain relations between that system and municipal law. Finally, in foreign relations, in dealings with aliens, in the rule of the colonies, and in the conduct of war something has been heard, if not of the old *summa potestas*, at least of the immunity of the officers of the Crown for acts done under its authority, though those acts may be an invasion of private rights.

III

FACTS OF STATE

THERE are a number of political facts which may be very important in a judicial investigation, upon which the attitude of the political departments of the State under whose authority the Court sits may be conclusive. The political status of territory is such a matter—whether it is independent or forms part of some, and what, foreign sovereignty. The question is usually determined in case of any doubt by reference to the appropriate executive department; but the attitude of the sovereign may be a matter of public notoriety (*Taylor* v. *Barclay* (1828), 2 Simons, 213; *Foster* v. *Globe Venture Syndicate* (1900), 1 Ch. 811.) In the case of the *Charkieh* (1873, L. R. 4 A. & E. 59), where the question was as to the status of Egypt, Sir Robert Phillimore treated the question as one for judicial investigation and treated the answer of the Foreign Office to his enquiries as mere matter of information to be weighed with other facts. This course was expressly disapproved by Lord Esher, M.R., in the Court of Appeal in

Mighell v. *Sultan of Johore* (1894, 1 Q. B. 149), saying:

"When once there is the authoritative certificate of the Queen through her Minister of State as to the status of another sovereign, that in the Courts of this country is conclusive."

The question of the extent of British territory would seem to stand upon the same footing. In the case of the *Franconia* (1876, 2 Ex. Div. 1), it is true the question "whether the three miles of open sea next the coast are or are not part of the territory of England, meaning thereby the territory in which its law is paramount and exclusive," was judicially determined, in the absence of any executive declaration on the subject. But Brett, J.A., at p. 126, says:—

"Before examining this question I should wish to observe that the question what is or what is not a part of the realm, is in my opinion not in general a question for a judge to decide. . . . What are the limits of the realm should in general be declared by Parliament. Its declaration would be conclusive either as authority or evidence. But in the case of the open sea there is no such declaration, and the question in the case is necessarily left to the judges, and to be determined by other evidence or authority. Such evidence might have consisted of proof of a continuous public claim by the Crown of England, enforced when practicable by arms, but not consented to by other nations. I should have considered such proof sufficient for English judges."

In the *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (1877, 2 A. C. 394, 420), the Privy Council, considering the status of the Bay of Conception, observe that it is not necessary to have recourse to international law on the subject, for "the British Government has for a long period exercised dominion over this Bay, and their claim has been acquiesced in by other nations, so as to show that the Bay has been for a long time exclusively occupied by Great Britain, a circumstance which in the tribunals of any country would be very important; and, moreover—which in a British tribunal is conclusive—the British Legislature has by Act of Parliament declared it to be part of the British territory and part of the country made subject to the legislature of Newfoundland."

Neither of these cases speaks with a perfectly certain voice as to the conclusiveness of an executive declaration on the subject. But it is submitted that it would be intolerable that the door should be left open for an appeal to our Courts against the determination of the executive in a matter so vital to the conduct of those relations which are committed by the Constitution to the Crown. The Crown may annex and cede territory without any assent of Parliament, though cessions are sometimes confirmed by Parliament. It is difficult to believe that after the proclamations annexing the territory of the South African Republic and the Orange Free State, anybody

could have been heard to say in a British Court that the territories were still foreign because Great Britain had not got a little good by international law, and because her sovereignty over them was not yet recognised by foreign powers. It is true that annexation, like a declaration of war, is a definite power of the Crown; and it does not necessarily follow in either case that, because these acts of State belong to the Crown, the Crown can, independently of the *factum*, bind Courts by its dictum as to the existence of a state of things which it might bring about if it should think fit to do so. But it was decided in the United States as long ago as 1829 that the status of territory was conclusively determined by the action of the political departments of the Government (*Foster* v. *Neilson*, 2 Peters 253); and see *Williams* v. *Suffolk Insurance Co.* (13 Peters, 415), *Jones* v. *U. S.* (1890, 137 U. S. 202), and *In re Cooper* (1891, 143 U. S., 472), where, on an application for a writ of prohibition, the question being raised whether the Behring Seas form part of the territorial waters of the United States, the Court held that it was not within its functions while negotiations were still pending to decide "whether the Government was right or wrong, and to review the action of the political departments on the subject."

Section 4 of the Foreign Jurisdiction Act (1891) provides that where any question arises

in any proceeding, civil or criminal, as to the existence of British jurisdiction in any foreign country, the decision of the Secretary of State thereon shall be final. This provision, it is conceived, is mandatory; it establishes a course which the Court is bound to follow; and it may be taken to represent the British tendency in regard to this class of question.

The question whether territory is or is not hostile was long ago declared to belong to the executive: *Blackburn* v. *Thompson* (1812, 15 East, at pp. 90-91); *the Manilla* (1805, 1 Edwards Adm. Reports, 1), and *the Pelican* (Ibid. Appendix D.), where Sir Wm. Grant says:

"It always belongs to the Government of a country to determine in what relation another country stands to it; that is a point upon which Courts of justice cannot decide."

The determination of the status of territory is closely connected with the recognition of its Government, which is equally a political matter (*City of Berne* v. *Bank of England* (1804), 9 Vesey 374; *Republic of Peru* v. *Dreyfus* (1888), 35 Ch. D. 348; *Mighell* v. *Sultan of Johore* (1894), 1 Q. B., 189; *Carr* v. *Fracis Times & Co.* (1902), A. C., 176; *Duke of Brunswick* v. *King of Hanover* (1843-44), 6 Beav. 1, 57; (1848), 1 H. L. 1).

The most notable exemptions from British jurisdiction are in the case of foreign sovereigns,

diplomatic representatives and their suites, and public ships of foreign states. In all these cases, the question whether the individual person or vessel concerned has the *status* which gives exemption is a political fact in regard to which the Court cannot go behind the claim of the foreign sovereign or representative, or the recognition by our own executive. In the *Parlement Belge* (1880, 5 P. D. 197) the Court of Appeal laid it down that when a foreign sovereign claims property as the public property of his State, that declaration cannot be enquired into.

The existence of peace or war at any time or place is a question of fact upon which important legal relations depend; particularly it may involve grave questions as to the existence of martial law. It was decided in *R.* v. *de Berenger* (1814, 3 M. & S. 67), that a Court may take judicial notice of the existence of war between England and a foreign State, though, according to the opinion of Lord Eldon in *Dolder* v. *Huntingfield* (1805, 11 Vesey, at p. 292), not of war between two foreign powers, an opinion which has been doubted ("Phipson on Evidence," p. 17). In *Janson* v. *Driefontein Gold Mines Co.* (1900, 2 K. B. 339), Mathew, J., determined the time of the outbreak of war between Great Britain and the Transvaal by the Blue Books and the Certificate of the Secretary of State, which were accepted as evidence by agreement. It may be that the Court, while taking judicial notice of the fact that war

exists or existed at any particular time, does not take judicial notice of the exact time at which it began. But the undoubted prerogative of the Crown to declare war and peace (*Esposito* v. *Bowden*, 1857, 7 E. & B. 781) *suggests* that in any case of doubt, the statement by the Crown would be authoritative or conclusive evidence. This must, however, be considered doubtful. In *ex parte Marais* (1902, A. C. 109), the observations of the Privy Council point to the existence of war as a matter for judicial determination; and Professor Dicey ("Law of the Constitution," 6th ed., p. 509-510), and Sir Frederick Pollock (XVIII. L. Q. R. p. 156), speak of the existence of war as a question of fact to be determined like other questions of fact. But both the Privy Council and the learned authors referred to were dealing rather with a different question—whether a state of war exists in a given place, *i.e.* whether that place is the seat of war; and it may well be that that question remains one for judicial determination, though the general question of peace or war with a certain State is conclusively determined by the declaration of the executive.

IV

MATTER OF STATE AS THE MATTER IN ISSUE

We now turn to the class of case in which the expression "Act of State" is best known—the case in which the matter of State is not merely a collateral fact but is actually part of the issue. It may arise either in civil or criminal proceedings, and the question may be brought up for determination in various ways. The form in which the matter is generally brought before the Court is that the plaintiff asserts certain facts which *prima facie* disclose a cause of action for the violation of some right of personal security, property, or contract. It may be that in addition to those facts, the plaintiff's claim itself sets out enough of matter of State to make it demurrable, as in *Duke of Brunswick* v. *King of Hanover* (1848, 6 State Trials, N. S. 34). More commonly the defendant pleads the facts which constitute his matter of State, and then denies the jurisdiction of the Court. This is the "new plea" described by the Lord Chancellor in the leading case of the *Nabob of the Carnatic* v. *East India Co.* (1791, 1 Ves. Jr. p. 371), and he points out that it differs from the ordinary plea to the jurisdiction

in that it does not refer to any other Court as having jurisdiction over the matter; that it is in substance a plea in bar. Such a plea does not justify the acts in law; on the contrary, it asserts the incompetence of the Court to enquire into their lawfulness at all—"even if a wrong had been done it is a wrong for which no Municipal Court could afford a remedy" (*Secretary of State* v. *Kamachee Boye Sahaba*, 1859, 13 Moo., P. C. 22). As in modern times a Court has to determine for itself whether the matter is matter of State or not, the plea must contain a sufficient averment of facts to enable the Court to perform its function. In the case of the *Nabob of the Carnatic*, the defendant's first plea was over-ruled by the Chancellor; the Company could not claim the total exemption of a sovereign State from all jurisdiction, and the foederal nature of their transactions with the plaintiff could not be inferred from the delegation to them of the power to make peace and war—there was nothing to show that the transaction was not a simple commercial matter. Moreover, it was not sufficient to plead generally that by various deeds, charters, and acts they had regal powers; they must show how and what powers were given.[1] Later, the defendants put in an answer, which stated the several sources of their power, and specifically averred a "right to enter into foederal conventions," as well on their own behalf as on

[1] 1 Vesey, Jr. p. 371.

behalf of the British nation, and "that the transactions mentioned in the Bill are of a political nature and matters of State, and done in the exercise of peace and war and of making foederal conventions, and for the military defence of their territory and of the territories of the plaintift; and that the instruments mentioned in the Bill are treaties and foederal engagements of a political nature and matters of State, and therefore are not subject to any municipal jurisdiction, nor cognisable in this Court or in any Court of Justice, but only by and according to the law of nations," and therefore they were not bound to answer. This was held sufficient, and the bill was dismissed on the ground that "the whole was a political transaction."[1]

But it is not necessary thus to plead to the jurisdiction. "Matter of State," in the cases in which it is relevant at all, is equally an answer to the action, and in an action at common law might be raised under the general issue (*Buron* v. *Denman*, 1848, 2 Ex. 167). Similarly, in criminal proceedings, "Act of State" would be matter of defence in an appropriate case.

There are at any rate two other ways in which matter of State has been or may be raised. Though it may be assumed that the power of Chancery to enjoin proceedings in other Courts on this ground has long been obsolete, it seems clear that matter of State is a good ground

[1] 1793, 4 Bro. C. C. 179.

for prohibition to an inferior jurisdiction in which the matter is pending (see *De Haber* v. *Queen of Portugal*, 1851, 17 Q. B. 196; and *Wadsworth* v. *Queen of Spain*, 1851, 17 Q. B. 215, cases in which prohibition went to the Lord Mayor's Court in suits against a foreign sovereign).

In the case of a person in custody, the question of State may arise on an application to the judicial power for his release, either because the applicant contends that the matter for which he is held is not justiciable in any Municipal Court, or because the civil or military authority denies the competence of the Court to grant the release prayed. Examples of the latter are to be found in *ex parte Marais* (1902, A. C. 109), and *ex parte Milligan* (1866, 4 Wallace, 1)—both cases of detention under martial law, and in *The Chinese Exclusion Case* (130 U. S. 581), in which an immigrant alien was held by the executive authorities of the United States in alleged violation of a treaty. An example of matter of State raised by the prisoner himself, may be found in the well-known case of *The People* v. *M'Leod* (1841, N. Y. Hill, 377), arising out of the *Caroline* incident. In that case the defendant, whose writ of *habeas corpus* was supported by a demand from the British Government, was in custody on a charge of homicide, and claimed his discharge on the ground that the transaction was of a public nature, authorised and adopted by the British Government. The New York

Court refused the release on the ground that the matter in question, if relevant at all—which it denied—was relevant only as a defence at the trial, and was not matter for a *habeas corpus*. The decision of the Court is now generally condemned, and was denounced at the time by the American Secretary of State (Daniel Webster) probably in stronger terms than have been used in modern times by any responsible officer in regard to any judicial decision.

In determining what is matter of State at the present time, there are several factors which may have to be taken into account. First of all, there is the *party litigant*—whether he is sovereign or subject, and whether he is a subject of the sovereign in whose Courts the matter is depending or an alien. Secondly, there is the *authority* under which the acts are done, and the *nature of the acts themselves*—whether the authority of the sovereign is the one thing needful, or whether that authority confers immunity only upon such acts as are of an obviously public character, and are lawful as between independent States; and whether, apart from authority given by a lawful sovereign, some acts are so essentially public in themselves as to be outside municipal jurisdiction. Thirdly, the *place* in which the acts are done may be material—whether in our own territory or on the high seas, or in the territory of some foreign sovereign. These factors must be weighed in the several classes of cases now to be considered.

V

THE CROWN AND ITS AGENTS

THE immunity of the Crown from suit in its own Courts rests upon historical grounds distinct from matter of State. But the personal privilege of the King has assumed peculiar importance in view of the fact that the Crown personifies the State, and that no remedy can be had against the State except through the Crown. The shield of the Crown, so far as exemption from jurisdiction is concerned, does not cover the servants of the Crown; they are not excused by their official capacity from answering in the Courts for breach of legal duty arising out of their office (for a modern instance see *Felkin* v. *Lord Herbert*, 1861, 1 Dr. & Sm. 608). While, however, the servant or officer has to fulfil the law, and cannot escape his personal liability by vouching the Crown, the liability of the servant will not be made a means of enforcing a duty against the Crown itself. A good illustration of this rule is found in *R.* v. *Lords Commissioners of the Treasury* (1872, L. R. 7 Q. B. 387), where, though money of the Crown had been appropriated for

a given object, and was under the control of the Commissioners, *mandamus* to the Commissioners to pay the money was refused. The same principle had been acted on years before in *R.* v. *Commissioner of Customs* (1886, 5 A. & E. 380); see also *Louisiana* v. *Jumel* (1882, 107, U. S. 711). But the point is perhaps best exemplified by the distinction between trespass and ejectment. Ejectment will not lie against those who are in possession on behalf of the Crown, for the substantial effect if the plaintiff were successful would be that the land was recovered from the Crown (*Doe d. Legh* v. *Roe*, 1841, 8 M. & W. 579; and per Eyre, C.B., *Cawthorne* v. *Campbell*, 1 Anst. 205, 215). On the other hand, trespass will lie against the servants of the Crown though acting under the orders of the Crown; for they are individual wrongdoers, and their liability does not in any way legally involve the condemnation or loss of the Crown.[1]

This matter is very clearly dealt with in the minority judgment of the Supreme Court of the

[1] Even in actions against its servants, though there is no immunity, the interest of the Crown is recognized to the extent that it may demand a trial at Bar (*Lord Bellamont's Case*, 2 Salk. 625: *Buron* v. *Denman*, 2 Ex. 167). Further, there is a vestige of the *privilegium fori* in the rule which enables the Crown to remove into the Exchequer (and now enables it to remove to the Revenue side in the King's Bench Division) actions between private persons or against officers which substantially involve the consideration of the rights of the Crown in property or revenue (*A. G.* v. *Hallett*, 1846, 15 M. & W. 97). A full account of the practice of removal effected by an injunction from the Exchequer is contained in the judgment of Eyre, C.B., in *Cawthorne* v. *Campbell* (1790, 1 Anst. 205). See also *Churton* v. *Wilkin* (1894, W. N. 62); *Stanley* v. *Wild* (1900, 1 Q. B. 256).

United States in *U. S.* v. *Lee* (106 U. S. 196). In that case an action was brought against officers of the United States for the recovery of certain land belonging to the wife of the Confederate General Lee; and the Attorney-General of the United States interposed to object to the jurisdiction on the ground that the property had been appropriated by Government, and that to allow an action against the agents was in effect to allow it against the United States itself. The majority of the Court held that it had jurisdiction, and might try the lawfulness of the authority under which the officers held the land. A strong dissenting judgment proceeds on the lines adverted to—that to assume jurisdiction in such a case was practically to evade the rule whereby a sovereign State cannot be made amenable to the jurisdiction of any Court save by its own consent.

VI

MARTIAL LAW

In the discussions of the seventeenth century the King's Law Martial was sometimes treated by the prerogative lawyer as part of the law of State, sometimes as matter distinct from it, but always as something standing upon the same foundation; like it, outside the common law; like it, also, part of the law of the land, and falling with the law of State, if that system of doctrine should come to the ground. On the other hand, the Parliamentary lawyers admit that extraordinary occasions may require extraordinary measures to be taken by the Crown as by subjects, but this only by the common law doctrine which requires that measures for public safety should be limited by the necessities of the case,[1] so that martial law is itself part of the common law, and not a distinct and separate system depending on the prerogative. It is not proposed here to enter at large into the history and nature of the martial law: the subject has recently been considered at

[1] See *The Case of Saltpetre* (12 Rep. 12); and compare with *Mouse's Case* (Ibid. 62); *Hakewill's Argument on Impositions* (1610, 2 State Trials, 471); *Case of Ship-Money* (3 State Trials, 904-905).

length from different points of view by several different writers, whose opinions are accessible to every one interested in the subject (Mr W. H. Holdsworth, Mr H. Erle Richards, K.C., Mr Cyril Dodd, K.C., and Sir Frederick Pollock, in the "Law Quarterly Review," vol. xviii.; Mr G. G. Phillimore, "Journal of Comparative Legislation," vol. ii. N. S., 1900, p. 45, and vol. iv. p. 128; and Professor Dicey, "Law of the Constitution," 6th ed., p. 513). Dealing for the moment merely with the historical question—what was meant by the Petition of Right—the present writer may state his own opinion that the Petition of Right aims directly at the prerogative doctrine, and is general in its application whether in peace or war, while it in no way impairs or alters the powers given by the common law. It is not to be forgotten that the differences in law between the two great parties in the State were very clearly defined, and had been clearly defined at least since the arguments in *Bates's Case* in 1606; and that in 1628, there were great lawyers in the field on both sides. Martial law was not an isolated case; it was, as has been said, a phase of "matter of State," and it is difficult to suppose that a doctrine so strenuously denied in general would be admitted in this particular.

It is, however, undoubtedly true that the tradition of a prerogative to proclaim martial law—to suspend the ordinary law in time of war and rebellion—has passed down to modern times; and, in

addition to the cases mentioned by the writers referred to, we may add old forms of commission to colonial governors which, conferring upon them the power to execute martial law, clearly regard that power as a function inherent in the Crown, which the King can delegate to his representative. A clause containing this power is found in the commission to Lord de la Warr as Governor of Virginia in 1610, and soon became a common form (see Stoke's "Constitution of British Colonies," p. 159); the terms in which it is granted to Bernard as Governor of New Jersey in 1658 are substantially those used in the commission to Captain Phillip as first Governor of New South Wales in 1787—"to execute martial law in time of invasion or other time when by law it may be executed, and to do and execute all and every other thing which to our Captain-General and Governor-in-Chief doth or ought of right to belong."[1] It is true that in the seventeenth and eighteenth centuries there were very current views of prerogative power in the colonies which survived the rebellion and the restoration. Further, the ambiguity and confusion which attend the phrase "martial law" throughout, of course attend it here, and there are sometimes indications that it is used in the sense of the discipline of the forces. But we have evidence of the powers it was thought to convey. In 1790, under Governor Phillip's commission, martial law was proclaimed in Norfolk Island to

[1] "Historical Records of N. S. W.," vol. i. pt. 2, p. 64.

be "the only law by which the settlement should be governed until further orders."[1] Writing of the proclamation, one of the officers explains that by means of it "robberies might be punished according to their deserts, which, if military law had not been proclaimed, no robbery could have been punished but by corporal punishment, and tried only by justices of the peace, whereas now a court-martial can take place, and the offenders punished with death"[2] (*sic*).

The principle of necessity as the foundation of the power to override private rights was explicitly accepted by the Supreme Court of Pennsylvania in 1788 as to acts done by the American forces during the revolutionary war (*Sparhawk* v. *The Republic*, 1 Dallas, 357); and by the Supreme Court of the United States in 1849 and 1851 (*Luther* v. *Borden*, 1849, 7 Howard, 1; and *Mitchell* v. *Harmony*, 1851, 13 Howard, 115). It is a feature of most of the United States cases on martial law that the legislature had itself intervened and established the system; but it will be seen that this in no way deprived the Court of the duty of determining the very grave question as to the powers which it confers upon the officers who execute it. *Luther* v. *Borden* was an action of trespass for breaking and entering plaintiff's house; the defendant pleaded an insurrection which plaintiff was aiding

[1] "Historical Records of N. S. W.," p. 319.
[2] Ibid. p. 381.

and abetting, the establishment of martial law, and that the acts complained of were necessary acts in the suppression of the insurrection. The Court held that the power to maintain itself by force was essential to every free Government, and they add (p. 45):—

"It was a state of war; and the established Government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one who from the information before them they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched when there was reasonable ground for supposing that he might be there concealed. Without the power to do this, martial law and the military array of the Government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom or by whose orders it is committed would undoubtedly be answerable" (p. 46).

Mr Justice Woodbury delivered a strong and most interesting opinion, dissenting from the judgment of the Court. By "martial law" he understands nothing less than the suspension of the whole constitution and the total supersession of ordinary law by absolute power, which leaves every citizen in his person and his property at the mercy of the

military authorities. This he considers was the "martial law" discussed and condemned in the seventeenth century; he can see no reason for giving to so well known an expression the limited effect given by the majority of the Court, and he considers it wholly beyond the power of the Legislature to establish such a system.

This decision seems to support the view that *bona fides* with reasonable and probable cause, rather than immediate and overwhelming necessity, is justification for overriding private right where war exists. But it determines also that neither the one nor the other justifies the use of force in excess of the purpose to be effected. Thus, an arrest might be justified but the detention not; and rigorous and punitive imprisonment would be unlawful where there was merely reasonable and probable cause for detention.

On the other hand, the observations of the Court in *Mitchell* v. *Harmony* (13 Howard, 115) point to nothing less than immediate necessity as a justification. In that case a claim was made against a military officer in respect of the seizure of non-hostile property during the Mexican war, and the defendant pleaded in effect that his acts were done in the course of military duty, and that this was a sufficient defence. But the Court held that such an interference with private rights was only justifiable in cases where the danger sought to be provided against was immediate and impending: "It is the emergency which gives the

right, and the emergency must be shown to exist before the taking can be justified" (p. 134). The only mitigation is that the emergency must be judged according to the state of facts as they appeared to the officer at the time of acting; but a mere honest judgment, or a taking *bona fide* to promote the public service, is insufficient (p. 135). The seizure of property to ensure the success of a distant and hazardous expedition which the force in question is about to undertake is not such a necessity as falls within the justification. The decision has been followed in numerous cases which are collected in "Notes to United States Reports," vol. v. pp. 148-149.

The necessity does not extend to the exercise of these extraordinary powers in a place which is remote from the actual seat of war. *Ex parte Milligan* (1866, 4 Wallace, 2), which was cited *in re Marais* (1902, A. C., at p. 111), was a petition for discharge from unlawful imprisonment. The petitioner had been arrested in the State of Indiana, and tried and condemned to death by a military tribunal on various charges of disloyal conduct. The commission sat under the authority of a proclamation by the President whereby all rebels, aiders, and abettors, etc., within the United States should be subject to martial law, and liable to trial by military commissions. The State of Indiana was not a place in which the war was being carried on, and petitioner relied on this fact, that he was not in the military service of the

United States, and had not been during the war within the limits of any of the States in rebellion. For the United States, it was contended that neither residence nor propinquity to the field of actual hostilities is the test to determine who is or who is not subject to martial law.

"The crimes of the petitioner were committed within the State of Indiana, where his arrest, trial, and imprisonment took place; within a military district of a geographical military department, duly established by the Commander-in-Chief within the military lines of the army, and upon the theatre of military operations; in a state which had been and was then threatened with invasion, having arsenals which the petitioner plotted to seize, and prisoners of war whom he plotted to liberate; where citizens were liable to be made soldiers and were actually ordered into the ranks; and to prevent whose becoming soldiers the petitioner conspired with and armed others" (p. 17).

On the other hand, Mr David Dudley Field, for the petitioner, put the question thus:

"Is it true that the moment a declaration of war is made, the executive department of the Government, without an Act of Congress, becomes absolute master of our liberties and our lives? Are we then subject to martial rule, administered by the President upon his own sense of the exigency, with nobody to control him, and with every magistrate and every authority in the land subject to his will alone? These are the considerations which give to the case its greatest significance" (p. 22).

The Court, taking judicial knowledge of the fact (p. 121) that in Indiana, the federal authority was always unopposed, and its Courts always open to hear criminal accusations and redress grievances, held that the military commission had no jurisdiction over the prisoner, and that Congress could not grant such power. The contention of the United States that on the outbreak of war the military power superseded the civil, was fatal to every kind of civil liberty. What the Court recognises is very interesting.

They held (1) that *Congress* may suspend the writ of *habeas corpus* generally, so that the Government, if in the exercise of discretion it sees fit to make arrests, should not be required to produce the persons; but this power does not extend to the supersession of other civil guarantees, and particularly does not extend to a power of establishing other tribunals and modes of trial than those known by the common law (pp. 125-126).

(2) That where war actually exists in a community, and the Courts and civil authorities are overthown, there being an actual and present necessity — a *real* (as distinguished from a *threatened*) invasion such as effectually closes the Courts and deposes the civil administration —then, on the theatre of active military operations, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society; and

as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.

"As necessity creates the rule, so it limits its duration; for if this government is continued after the Courts are reinstated, it is a gross usurpation of power. Martial law can never exist where the Courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war" (p. 127).

The case of the rule which can be exercised by a military commander in hostile occupation is not under consideration. In the end, the prisoner was ordered to be liberated on the construction of an Act of Congress of 1863, under which persons arrested and not brought to trial were to be liberated on entering into recognisances for good behaviour, and taking certain oaths prescribed by law.

No clearer case of the foundation of martial law upon necessity can be found in the books. But it is noteworthy that martial law is conceived as a distinct and definite system of law to be applied on occasion of necessity, which rather suggests that if the Court were satisfied that the occasion for the application of martial rule had arisen, it would decline to enter into the further question of the necessity of the particular measures taken under that *régime*. This, of course, is connected with the view that the occasion can arise only when the Courts are actually overthrown and

superseded. It is submitted that the judgment is quite consistent with this—that apart from such overthrow of civil authority, the exigencies of war or rebellion may require extraordinary exercise of authority by the Executive, the legality of which is to be judged according to the necessities of the particular case.

The decision of the Privy Council in *re Marais* (1902, A. C. 109) seems clearly to involve the doctrine that at least within the area of military operations war supersedes the jurisdiction of the civil Courts sitting as such to interfere with the acts of military authorities; and that it is incompetent in such cases to enquire into the matter of necessity. The unguarded language of the Board has been variously interpreted, and it is difficult to state with any precision the *ratio decidendi*. But commenting on that language, Professor Dicey says:

"It does not necessarily assert more, and as regards transactions taking place in England cannot be taken to mean more, than that the Courts will not, as indeed they cannot, interfere with actual military operations or while war is actually raging entertain proceedings against military men and others for acts done under so-called martial law. The judgment of the Privy Council in short asserts nothing as to the jurisdiction of the Courts when peace is restored in respect to acts done during time of war" ("Law of the Constitution," 6th ed., p. 510).

In *re Milligan* the war had been brought to a

close when the case came before the Supreme Court, and, moreover, the discharge of the prisoner took place under an Act of Congress made in reference to the circumstances arising out of the war. Further, the Courts of the United States are very familiar as a matter of constitutional law with the difference between actual control of an act of authority and subsequent redress against an officer; *e.g.* a State Court is incompetent to prohibit or enjoin an act purporting to be under federal authority, but is quite competent to entertain an action for damages against the officer for so acting. The case is therefore not a distinct authority against Professor Dicey's interpretation. But it is hardly consistent with the views maintained in the case that the civil Courts should abstain from jurisdiction in any matter unless they are actually overturned by the exigencies of war, or at the least are plainly exercising their functions as the organs of military authority; and this the Supreme Court decides can only take place at the seat of war. That in the case of acts admittedly illegal the Courts should be bound to refuse jurisdiction, both to prevent the commission of the acts and to enforce remedies and punishments; that this duty remains during the war; and that after the war is over the jurisdiction revives, and the legality of the acts may be tried according to the immediate necessities of the case—these are novel doctrines, which may be consistent with the views expressed by the Privy Council in *re Marais*,

but which are hardly what was intended by the Board; nor is it easy to see upon what principle they are based. That they involve grave danger to individual security is apparent; a man may be sentenced to death and executed under military authority in circumstances which are plainly illegal, and which may bring the military officer to trial for his life when the war is over. It can hardly be supposed that the officer draws strength of mind and purpose from such a position. If it be said that he is not to be withdrawn from his military duties to answer such claims or charges, as analogy to a doctrine at one time held as to colonial governors might suggest, it is plain that any immunity on that ground must relieve him from answering all proceedings in non-military tribunals, whether arising out of his military conduct or not; and we are almost back to the sixteenth century, when it was not at all uncommon for the Privy Council to stay suits against defendants who were at the wars.[1]

It is of course apparent that the discussion of martial law has been darkened by the various senses in which the term is used. It is used, as we know, to describe the power to repel force by force, and this is now clearly distinguished from martial law as a system of authority comprehending absolute legislative, executive, and judicial power. It may be that we should expand some-

[1] In 1900 the Supreme Court of Ceylon held that a military officer ordered on active service could not be arrested on civil process.

what the first notion, and extend it to the taking of such steps as are necessary, not merely for the direct suppression of disorder, but for the prevention of any possible comfort or assistance to the enemy in time of war or rebellion, or any interference with the military operations of our own forces. These objects may require steps to be taken far from the seat of war—the removal of persons from a particular locality, the prevention of exports of certain commodities (as suggested in *Hampden's Case*), the seizure and control of telegraph stations, the opening of private letters (see *Morcom* v. *P. M. G.*, "Journal of Comp. Leg." Dec. 1900, p. 514), and the censorship of messages, the arrest of suspected persons and search of their houses, the occupation of property. Whether any, and which, of these measures are lawfully taken will be judged in each case according to the circumstances thereof; not by any military tribunal, but by the ordinary Courts of law, whose jurisdiction is in no sense in abeyance. Whether the test be "immediate and overwhelming necessity" or "reasonable and probable cause" for the act complained of, having "regard to the public danger," may be as yet undetermined; on the one hand, the mere advantage to the public service would not be a justification; on the other, the Court would no doubt look not merely at local circumstances, but at the whole military situation as known to the authorities. It is submitted that the Court would also take into account

the duty of the executive to exercise its judgment in providing for the public safety, and to carry through the operations of the war; in this sense it may well be that acts would be justifiable when done under public authority which would not be justifiable when done with the best of public motives by individuals. (As to the attitude of the Courts to matters of military discretion, see *per* Jessel, M.R., in *Hawley* v. *Steele*, 1877, 6 Ch. D., at p. 528.)

But in the actual theatre of war, the position may be different. If such a state of disorder has been introduced into the community that the Courts and civil authorities are deposed by the actual invasion of the enemy, the necessity of the case may require a military *régime* until the ordinary laws can have their free course. This is what is declared in *re Milligan*. While necessity, creating the rule, limits its duration, it is impracticable to restore the normal conditions of peace at once, even if the locality has been finally cleared of the enemy. For a time the locality must submit to military government, and if the civil authorities are restored, they act not independently but as the delegates and organs of the military authority. There is in fact an analogy, though, it is submitted, no more than an analogy, to the settlement of a conquered territory, the *status* of which was dealt with in *Elphinstone* v. *Bedreechund* (1830, 2 State Trials, N. S. 379). This is the state

of things to which the rules laid down by the Privy Council in *re Marais* are obviously applicable. But that case decides that war exists not merely where the civil Courts have been overthrown, but also wherever the circumstances of the war have made the military authority predominant in fact, so that all other organs are plainly subordinate to them. The seat of war is thus extended to an area beyond that which was recognised by the Supreme Court of the United States; but it still remains for a civil Court, either during or after the war, to determine whether a given place is one "where war exists," and this of course involves an enquiry into the actual exigencies of the military situation at any moment.

It is submitted that this view overcomes some of the difficulties which belong to a very difficult subject. The civil society is not dissolved even temporarily, but a military organisation is imposed upon it. The ordinary law between subject and subject remains unaffected, whatever difficulties may attend its administration. But so far as the authority of the military government is concerned, its acts are under a new *régime*, which has superseded the customary relations of the executive and the citizen; and whatever is done *bona fide* as an act of military authority is lawful, and cannot be questioned in civil Courts. There is no question here of the justification of the particular act complained of by necessity; the

enquiry as to necessity, if to be made at all, goes further back or forward—viz.: was the assumption of military authority and the supersession of ordinary rule by the establishment of martial law necessary; or had the necessity for such assumption and supersession ceased? Neither is there any question of the liability after the war for acts done during the war: it was not merely the jurisdiction but the law which was in abeyance. But presumably, in order to have the character of an act of military authority, the act must have been done in good faith by the defendant; though this may depend on the answer that is finally given to the question raised in *Sutton* v. *Johnstone* (1786, 1 T. R. 493).

On this hypothesis it is possible to support the carrying out after the restoration of peace of sentences of imprisonment pronounced against civilians by military tribunals during the war. If the necessity for every act is examinable, and its legitimacy limited to the necessity of the case, it is not easy to see how any detention is justifiable after the necessity has come to an end, *i.e.* at the furthest, the close of the war; the danger which was the sole reason for any extraordinary interference has passed. But if martial law be a system of authority with its own organs of justice, there is no anachronism in requiring persons convicted in its Courts to serve their sentences.

This theory of the twofold character of martial law is no doubt inconsistent with much that

has been said on the subject, and much that has been said judicially. To the writer it seems to be the only way in which the reasons contained in the judgment in *re Marais* can be made to harmonise with the views commonly held among English lawyers upon the subject; or that if that harmony is impossible, it is at any rate a working compromise.

VII

THE COLONIES AND DEPENDENCIES OF THE CROWN

HERE the matter has two aspects: first, the general claim that the governor of a colony has as such certain immunities from jurisdiction; secondly, the special position of colonies acquired by cession or conquest.

As to the immunity of a governor, this has been put in various dimensions, and has been considered in relation to his subjection to jurisdiction in England or in his dominion, and as to whether it is absolute or applies only to acts done by him in his capacity of governor. Some of the doubts on the subject are expressed in the preamble to 11 & 12 Will. III. c. 12, which recites that due punishment is not provided for crimes committed by colonial governors in their possession, whereof many have taken advantage, "not deeming themselves punishable for the same here (*i.e.* in England), nor accountable for such their crimes and offences to any person within their respective governments and commands." The act declares that if a governor oppresses any

within his government, or is guilty of any other crime or offence, contrary to the laws of the realm, or in force within his government, such offence may be tried in England, and punishable as if committed in England.

The position of a colonial governor seems first to have been considered by the Courts in *Witham* v. *Dutton* (1688, 3 Mod. 160), and on appeal *sub. nom.* *Dutton* v. *Howell* (1694, Showers' "Parliamentary Cases," 24). The action was brought in England against the Governor of Barbadoes for assault and false imprisonment in Barbadoes; and the defendant pleaded first, not guilty; secondly, that as Governor he had power to appoint a Council, and with the advice of that Council to establish Courts and appoint officers; that plaintiff was appointed to administer the government during defendant's absence; and that on defendant's return, plaintiff was charged before the Council with mal-administration, and the Council ordered that he should be committed until discharged by law, which was done accordingly. The Court was of opinion that the plea was not good, and the defendant took the case to the Lords by writ of error. In the Lords it was argued, first that the action did not lie, for defendant's acts were done by him in a judicial capacity; that the defendant had all the powers of a governor, and that the cause was not conusable in Westminster Hall, and the defendant was only censurable by the King; that this was a charge

before a Council of State, and there need not be all the matters precisely alleged to justify their acts; that the plea might have been much shorter, as only that plaintiff was committed by a Council of State; that the Governor who had power to make judges was more than a judge, and that an action should no more lie against him than against the Chief Governor of Scotland or Ireland; that Governments would be very weak, and the persons trusted with them very uneasy if they were subject to be charged in England with actions for what they had done abroad. The plaintiff denied the judicial power of defendant, or his Council; and contended that the conusance of the matter could only be raised by a plea to the jurisdiction and not in this form; that Barbadoes was a plantation and not a conquest, and therefore not within any absolute power of the Crown, but under the laws of England; that "as to the commitment by a Council of State, what it means is hardly known in the laws of England, and that authority which commits by our law ought to be certain and the laws expressed, as all the arguments upon the writ of *habeas corpus* in old times do show"; and that as to the consequences "there is more danger to the liberty of the subject by allowing such a behaviour than can be to the Government by allowing the action to lie." The judgment was reversed, and we are left to infer the reasons, though the headnote in 3 Modern Reports, refers it to the judicial capacity

in which the Governor acted; and this explanation is accepted in *Hill* v. *Bigge* (3 Moo. P. C., at p. 482). The case, however, gave colour to the doctrine that a governor cannot be sued in England for acts done by him in his political capacity, and that no further justification need be shown. This was negatived by the King's Bench in *Mostyn* v. *Fabrigas* (1774, Cowper, 161), where Lord Mansfield rejected the argument that "the defendant being Governor of Minorca is answerable for no injury whatsoever done by him in that capacity." That a colonial governor has no immunity from suit in England has ever since been accepted as sound law, and was not questioned by the defendant in *Phillips* v. *Eyre* (1869, L. R. 4 Q. B. 225; 1870, 6 Q. B. 1), the whole dispute in that case being whether a colonial act of indemnity was a bar to the suit in England.

The question of the liability of a governor to judicial proceedings in his possession remains. A principal reason for Lord Mansfield's decision in *Mostyn* v. *Fabrigas* was, that in his opinion the governor was "a viceroy, against whom during his government no action, civil or criminal, could be brought in his dominion." The immunity suggested here, if it existed, could not be confined to acts done by the governor in his political capacity, for the reason given—that "upon process he would be subject to imprisonment"—is equally applicable to proceedings of every kind. Accordingly, in the case of the Lord Lieutenant of

Ireland, we find that judicial opinion has pushed the immunity to the full length. In *Tandy* v. *Lord Westmoreland* (1792, 27 State Trials, 1246), proceedings were instituted in the Irish Exchequer against Lord Westmoreland *eo nomine*. Lord Westmoreland was at the time Lord Lieutenant of Ireland; he took no steps to appear, and the time for appearance having lapsed, the Attorney-General moved to quash the proceedings, and to prohibit any further action. The cause of action was not disclosed, and the plaintiff's argument was at large—"whether any action, civil or criminal, can lie locally against a Lord Lieutenant during his government"? The Court, while expressing the opinion that the Lord Lieutenant had immunity from suit whatever the cause, sought to draw the plaintiff into an admission that his complaint was in respect of acts done by Lord Westmoreland in his official capacity, and eventually evidence was laid before the Court which made it clear that the action was for acts done by the Lord Lieutenant in his official capacity, so that the question was narrowed down thus: "Whether he may be sued for an act of State"? On this the Court quashed the proceedings, and used language which makes it tolerably clear that in their opinion the immunity of the Lord Lieutenant was as extensive as that of the King himself.

The position of the Lord Lieutenant of Ireland was discussed in two important cases during the

nineteenth century. In *Luby* v. *Lord Wodehouse* (1865, 17 Ir. C. L. Reports, 618), an action was brought in the Common Pleas against the Lord Lieutenant for acts which, as shown by the plaintiff himself, if done by Lord Wodehouse at all, were done, "whether rightfully or wrongfully, formally or informally, *quâ* Lord Lieutenant"; and the Attorney-General moved that the action be stayed, and that the writ of summons and plaint be taken off the file, the defendant not pleading. It was conceded in argument (p. 631) that the Lord Lieutenant could be sued "for every personal wrong aud every personal debt"; and the Court, following the decision in *Lord Westmoreland's Case*, held that the Lord Lieutenant was not to answer. They declined to order that he should be put to his plea, and declaring that the question whether the acts complained of were or were not done by Lord Wodehouse in his capacity as Lord Lieutenant was not fit to be submitted to a jury, made an order as prayed by the Attorney-General. In *Sullivan* v. *Earl Spencer* (1872, 6 Ir. R., Common Law, 173), the Queen's Bench followed the decision of the Common Pleas, and stayed the proceedings on a similar application. The Irish Courts have then clearly established that every act done by the Lord Lieutenant in his official capacity is an act of State for which the Courts of Ireland are without jurisdiction over him, so that it becomes unnecessary to follow the

plaintiff's argument in *Sullivan* v. *Earl Spencer* (p. 175) as to acts of *power* which are justiciable, and *acts of State* which may not be.

The Lord Lieutenant of Ireland may hold a more exalted position in virtue of his viceroyalty than a colonial governor, for it is now clear that the latter has no immunity from jurisdiction in his dominion, though Lord Mansfield's doctrine was revived as late as *Phillips* v. *Eyre* (4 Q. B., at p. 229) by Lush, J., who says, *obiter*: "The action does not lie in the colony, because it is a personal immunity of the Governor, while Governor, that he should not be sued."

In *Hill* v. *Bigge* (1841, 3 Moo. P. C. 465) the dictum of Lord Mansfield as to the inviolability of the Governor in the Courts of his possession was relied on in a case clearly outside the political capacity of the officer. The Governor of Trinidad was sued in that colony upon a jeweller's account incurred in England, and the Privy Council held that he had no immunity in such a matter, whatever might be the case as to acts done in his capacity of Governor. *Tandy* v. *Lord Westmoreland* was explained by its plainly arising upon acts done in the governmental capacity; and for the rest, the Board doubted the accuracy of the report, and disagreed with the dicta. As to the dictum in *Mostyn* v. *Fabrigas*, it was noted that the reason for immunity given by Lord Mansfield proved too much—for if the public inconvenience of the consequent restraint of

person and outlawry were to determine the matter, it applied as much to actions in England as to actions in the colony; and in any case the liability to be sued and liability to process of arrest were separable.

The question then narrows itself down to this—whether in respect to acts done in his official capacity, a governor is exempt from all proceedings in his own dominion, or is driven to justification, like other servants of the Crown. This was raised in *Musgrove* v. *Pulido* (1879, 5 A. C. 102), where the Governor of Jamaica was sued in the Supreme Court of Jamaica for alleged unlawful acts of authority, and pleaded that he was not bound to answer in the action, as the acts were done by him as Governor, and in his reasonable discretion as such, and as acts of State. It was held that, construing the plea as a plea of privilege, simply claiming personal exemption from suit, it could not, after the decision in *Hill* v. *Bigge*, be sustained; and that construing the plea in a larger sense, the mere averment that the acts were done by defendant as Governor and as acts of State, was not sufficient without such an averment of facts as would show that the acts complained of were really such acts of State as are not cognisable by any Municipal Court. As to the facts which might be sufficient, the Board recalls the judicial declarations that a governor is no viceroy but an officer of limited powers, and affirms that it must at least

appear that the acts were within the scope of his commission; otherwise, though the Governor may assume to do them as Governor, they cannot be considered as acts done on behalf of the Crown.

"When questions of this kind arise, it must necessarily be within the province of Municipal Courts to determine the true nature of the acts done by a governor, though it may be that when it is established that the particular act in question is really an act of State policy done under the authority of the Crown, the defence is complete, and the Court can take no further cognisance of it" (p. 111).

The Board thus does not pronounce upon the question, whether the authority of the Crown may be successfully asserted by a colonial governor to oust the jurisdiction of the Courts and prevent the enquiry whether acts which they determine to be acts of policy and power are also justified by law. But it is submitted that at least their remarks do not countenance that in this case a state of things so exceptional in the British system does exist. The point before the Board was as to the meaning of a plea; the principal feature of the judgment is a close examination of the averments of the plea; and the remarks cited mean no more than this—that even if a colonial governor were in the predicament suggested, the plea claimed so much more of immunity that it must be disallowed. There

need be little hesitation in accepting the conclusion that the general rule that acts done in the name and with the authority of the Crown are only justifiable if they are acts which the Crown can lawfully do or authorise, applies to a colonial governor as to other officers of the Crown.

The other question as to the position of colonies arises as to possessions acquired by cession or conquest. The circumstances of such acquisition bring the case close to matters of treaty and war; the despotic power which the Crown may exercise over a conquered colony, at any rate, has in fact been attributed to the position of the inhabitants as public enemies whose lives and property are in the King's hands, so that any severity he may exercise in regard to them is indeed clemency, for all is forfeit.[1] The act of acquisition is an act of State, and acts incident to the reduction of the place into peaceable possession are like the acquisition itself outside the jurisdiction of Municipal Courts. This is the ground of the decision of the Privy Council in *Elphinstone* v. *Bedreechund* (1830, 2 State Trials, N. S. 379). In this case the High Court of Bombay had held that when a conquered country became part of the British dominions it came under the principles of English public law, and that there was no truth in the doctrine that a military man, by giving the name of martial law to his proceedings, is

[1] 1722, 2 P. Will. 75.

ceded; the *time*, though little more than twelve months from the annexation; the *place*, the territory annexed; nor the *cause*, which was alleged to be the peace of the territory, nor all of them together, was sufficient to make *act of State* where the person had been received into protection as a British subject, and a settled system of law and government existed in the place. The fact that the Governor assumed to act not with a disregard to all law, but in accordance with law, could hardly affect the matter if the true relation of the parties were such as to put the matter outside judicial competence.

The case of *Cook* v. *Sprigg* (1899, A. C. 572) arose out of the same cession and annexation. The claimant was a British subject who had before the cession obtained certain concessions of land from the paramount chiefs of Pondoland; and the case treats the grantors as a sovereign capable of making such a grant, and also treats the grant as effectual to convey a complete title, so that the case is in no sense one of those in which civilised States decline to recognise pretended grants from barbarous native tribes. The Cape Government declined to recognise the concession, and the grantee brought an action against the Government in the Cape Courts. Here, of course, the status of the place was the same as in the last case—it had received a system of law and government. The claimant's right to the protection of the law was certainly an equal

right, one might say an *a fortiori* right; there was no suggestion that he threatened the peace of our new possession and the British dominion there—the right which he asserted was an ordinary right of property, which it was not attempted to distinguish from rights of private property in general. As to the time, the repudiation of the concession took place within a year of the cession, but, at any rate, after the acquisition was complete, and the territory had passed from the immediate control of the Crown to that of the Cape Government. The Board held that the acquisition of Pondoland was an act of State—a transaction of independent States between each other governed by other laws than those which Municipal Courts administer; and that though by the ordinary principles of international law private property ought to be respected by the sovereign who accepts a cession, no Municipal Court has power to enforce such a duty. The Board added *obiter* that the existence of express treaties for the preservation of private rights would be no more than an international bargain which could be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure. It is not easy to see why the right of property in this case was not equally with the right of personal security in the other under the protection of the Courts of Law; and it is somewhat startling to find the defence of *act of State* accepted in regard to acts done by a subordinate

government in territory incorporated into an old established British colony, after a system of law and government has been provided, and when those acts relate to the property of a British subject. It may be that the decision is explicable on the ground that the claimant's right was no more than a contractual claim against the Government, and that upon a change of sovereignty the new State is not bound in municipal law by the obligations of its predecessor, so that the case falls within the class of *Doss* v. *Secretary of State* (1875, L. R. 19 Eq. 509); but the reasons as stated by the Board go far beyond this, and relate to the position of private property in general.

It has, of course, always been recognised that a conquered or ceded colony differs from an occupation colony in that in the former the Crown has an extensive legislative power, which may be exercised until a representative legislature has been granted, and we have seen that in the beginning of the eighteenth century this was attributed to the King's power over the lives of his enemies. This ground, however, is hardly likely to be taken nowadays,[1] and in any case it is not fairly applicable to the case of a place acquired by peaceful cession. The *status* of a ceded or conquered colony is defined by Lord Mansfield in the great case of *Campbell* v. *Hall*

[1] But see *per Curiam* in *West Rand Gold Mining Co.* v. *The King* (1905, 21 Times, L. R. 562; [1905] 2 K. B. 391).

(1774, Cowper, 204), and the canons of government there enunciated show that the legislative power of the Crown is not unlimited. As a dominion of the Crown, such a colony is subject to the Imperial Parliament, and therefore to any act of that Parliament extending to the colony; and from these acts of course the King cannot except it. The King is also declared incompetent to make any change in the laws of the place contrary to "fundamental principles"; and it is laid down that the inhabitants once received under the King's protection become subjects, and are universally to be regarded in that light, not as enemies nor as aliens. Finally, the "articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable, according to their true intent and meaning." Now it is not conceivable that Lord Mansfield was here declaring mere counsels of perfection; in his opinion the articles were rules of constitutional law limiting the power of the Crown, and in this sense they are taken by the Privy Council in *Cameron* v. *Kyte* (1835, 3 Knapp, at pp. 341-342), where Parke, B., speaks of the King having the legislative authority in a conquered colony "in so far as he may not have parted with it by capitulation or his own voluntary grant." With this view, the *dicta* if not the decision in *Cook* v. *Sprigg* are inconsistent: "if there is either an express or a well-understood bargain between the

ceding potentate and the Government to which the cession is made, that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure." In *Cook* v. *Sprigg*, there was no express bargain, and the only well-understood bargain appears to have been the ordinary rule of international law that private property should be respected, which may very well not be a rule of constitutional law binding the Crown any more than it binds Parliament. Still, it is not impossible that it may be one of those "fundamental principles" which do, according to Lord Mansfield, limit the power of the Crown.

It does not seem to the writer that the relation between the British Crown and its new subjects can reasonably be regarded (as it is in the *dicta* in *Cook* v. *Sprigg*) as involved in the relation between sovereign and sovereign; *ex hypothesi* the parties affected have ceased to be under the protection of the former sovereign. In the United States it has been repeatedly affirmed that the new Government upon a cession succeeds merely to sovereignty; that all rights of property remain unimpaired, and that, independently of any treaty, the new subjects have the ordinary rights of subjects in property as against the Government. It is pointed out, however, that persons who have not become subjects but have availed themselves of the common provisions in treaties of cession

that they may elect to retain their old nationality, must look for their rights to the treaty alone (*U. S.* v. *Pertcheman*, 7 Peters, 51; *U. S.* v. *Repentigny*, 1866, 5 Wallace, 211, 260). Even these treaty rights are legally recognised, and as part of the law of the land will prevail against any attempt on the part of a State Government to ignore their provisions, and overrule the rights protected by them (*Ware* v. *Hylton*, 3 Dallas, 199). It would not be unreasonable, however, that such mere treaty rights of aliens should, as against the Government of the United States, be regarded as political merely, and that the Courts should decline to review the action of the executive in relation thereto, leaving the whole matter for diplomatic adjustment. This conclusion is suggested by what has been cited[1] from *In re Cooper* (1891, 143 U. S. 472), and the *Chinese Exclusion Case* (130 U. S. 581). In the latter case indeed the Court speaks of such rights "as are connected with and lie in property capable of sale and transfer or other disposition," as rights created by a treaty so vested that its expiration or abrogation will not destroy or impair them. But the question then resolves itself into the relations between a non-resident alien and the supreme Government, which, upon general principles is a political, and not a legal question.

[1] *Vide ante*, pp. 36, 43.

VIII

THE EXECUTION OF TREATIES

By the British Constitution[1] the Crown has the prerogative of making treaties with foreign powers, and this prerogative exists to the exclusion of all other organs of the Constitution, and is not defined as to the matters with which it may deal. But it does not follow that the Crown is by the Constitution armed with every power necessary for the execution of its treaties, and it is the fact that Parliament is frequently resorted to for this authority (see Holland's "Studies in International Law," pp. 176 *et seq.*). There are, indeed, opinions which suggest that the power of execution attends the power of agreement; that a treaty is a source of law, and that subjects acting in disregard of treaties are guilty of an offence for which they may be punished. There is an opinion of the civilians Exton and Lloyd, in 1677,[2] that where the King has by a treaty of alliance with another State agreed that the subjects of neither power shall accept commissions

[1] Blackstone's "Commentaries," vol. i. p. 256.
[2] Chalmers, "Opinions," ii. 330.

from third States against the other, the acceptance of such a commission is "a crime against His Majesty's treaties of peace, and the strict proclamations he has been pleased to set forth for the due observance of them"; but the only practicable proceeding advised, is for a statutory piracy under 28 Henry VIII. c. 15. As to treaties of commerce, Chitty[1] expresses the opinion that a treaty forbidding any particular commercial dealing between the two countries might have the effect of making it illegal for a British subject to enter into such commercial transactions; but the accuracy of this opinion is very doubtful, and there are strong opinions to the contrary by the Attorney- and Solicitor-General (Yorke and Talbot), in 1728, and the Advocate-General (Simpson), in 1756.[2]

The seventeenth century cases suggesting the special functions of the Chancery as a Court of State in regard to treaties of peace have been already referred to. In *Weymberg* v. *Touch* (1669, 1 Ca. Ch. 128) and *Troner* v. *Hassold* (1670, 1 Ca. Ch. 178), bills were filed in Chancery by foreign debtors for relief against proceedings at law to enforce certain debts. There had been war between England and Denmark, during which each country required its subjects to pay to it any debts due to subjects of the enemy. On the treaty of peace it was agreed that such

[1] Chitty on "The Prerogative," 170.
[2] Chalmers, "Opinions," ii. 342, 337.

exactions were to be compensated by setting those of the two Crowns against each other. The plaintiff contended that the Chancery was a Court of State, and that the peace was enrolled there, and that it was the proper tribunal to give effect to the treaty. The defendant in equity demurred, insisting that the plaintiff had no equity; and that if the articles did bind private persons, they were as good at law as in Chancery; and that at law they did not bind, for defendant had had a verdict. In both cases the defendant was, nevertheless, ordered to answer; but in *Troner* v. *Hassold*, the Lord Keeper (Bridgeman), ordered that the benefit of this demurrer should be saved to the defendant at the hearing.

It is clear that, apart from statutory authority, many treaties do profoundly affect legal rights. Of these, treaties of peace and treaties for the cession of territory are an example. But the changes in right and duty which follow these treaties are less the creation of the treaties themselves, than the consequence of the condition of things which is called into existence. These treaties are transitory, and in a sense self-executing; and the new legal relations arise from the fact that peace and war, nationality and sovereignty, are fundamental conditions of legal right and duty. The history of the Foreign Enlistment Acts attests the difficulty of securing the observance by subjects of the peace which

exists between His Majesty and foreign States. But treaties of peace or for the cession of territory, may, and commonly do, contain other conditions, *e.g.* a treaty of cession will commonly provide as to the nationality of the inhabitants; or a treaty of peace may undertake that the subjects of one State shall no longer exercise certain rights which they have been accustomed to, or shall enjoy certain rights otherwise exclusively belonging to subjects of the other. The opinions of law officers of the Crown treat provisions of the first class, *i.e.* as to the nationality of inhabitants, as having the force of law (cf. Sir John Campbell, A.G., and Sir R. M. Rolfe, S.G., 1838, and Sir Frederick Thesiger and Sir Fitz Roy Kelly, 1843, Forsyth's "Cases and Opinions," pp. 327-328). Provisions securing to natives the right of "opting for British nationality" were included in the treaties for the cession of Heligoland to Germany in 1890, and with the rest of the treaty assented to by Parliament (53 & 54 Vic. c. 32).

The effect of the executory provisions of treaties upon the rights of subjects has come under judicial consideration in two modern cases, *The Parlement Belge* (1879, 4 P. D. 129), and *Walker* v. *Baird* (1892, A. C. 491). In *The Parlement Belge* proceedings were taken in the Admiralty for damages against a Belgian vessel; and the Attorney-General intervened by information and protest to inform the Court that the vessel was the property of the Belgian Govern-

ment, a public ship of that State, employed in its public service; and that she was a mail packet within the Convention between Great Britain and Belgium, whereby mail packets were to be vessels belonging to the Governments or freighted by them, were to have the immunities of vessels of war, were not to be diverted from their especial duty by any authority whatsoever, and were not to be liable to seizure. For the plaintiff it was denied that the Crown could by a Postal Convention confer the immunity claimed, and thereby deprive the subject of the statutory right of obtaining redress in the Admiralty for the damage alleged. Counsel admitted that, "with respect to some treaties of peace and war, the power of the Crown to bind British subjects was incontrovertible"; but this treaty was not of this class. Counsel for the Crown rested less on the effect of the agreement as such than on its effect as an incontrovertible declaration that the vessel fell within a class privileged by international law and the law of England:

> "The treaty is an act of State emanating from the sovereign, and determining the diplomatic status of the vessels described in it. As such an act of State it is binding on this Court and all subjects of the Crown, without the confirmation of Parliament" (p. 142).

This was the view ultimately taken by the Court of Appeal (5 P. D. 197); but Sir Robert Phillimore, in the Court of first instance, considered

that the plaintiff's claim was good. He laid it down that the power of the Crown to give effect to its treaties was not unlimited; and that "a Court of Justice, when called upon to execute the provisions of a treaty, may, at the instance of the subject who is affected by them, examine whether these provisions are such as to be capable of legal enforcement, just as it may enquire into the validity of Letters Patent granted by the Crown" (p. 152). This doctrine—that treaties are examinable by the Court—was not denied in the Court of Appeal, which decided merely that public vessels of foreign States, being by international law and the law of England exempt from jurisdiction, did not lose their exemption by being engaged in trade; and that the determination of the public character of a given vessel was a matter upon which the Court could not go behind the claim and declaration of the political authorities. In *Walker* v. *Baird* (1892, A. C. 491) the defendant's plea went the full length of alleging a prerogative in the Crown to make and execute treaties impairing private rights, and asserted that acts done in execution of such treaties were acts of State beyond the cognisance of any Court. The action was one against a naval officer for trespass; and the defence was that defendant was acting under the orders of Her Majesty for the purpose of putting in force an agreement between England and France for establishing a *modus vivendi* as to the Newfoundland fisheries; that

plaintiff was using his lobster factory contrary to the said agreement, and that defendant entered on plaintiff's premises and took possession in consequence thereof. The plea then went on to aver that the matters in question were "acts and matters of State arising out of the political relations between Her Majesty the Queen and the Government of the Republic of France, that they involved the construction of treaties and the said *modus vivendi* and other acts of State, and were matters which could not be enquired into by the Court." The plaintiff objected that the plea did not disclose a good ground of defence. The Privy Council held that "the suggestion that defendant's acts could be justified as acts of State, or that the Court was not competent to enquire into a matter involving the construction of treaties and other acts of State," was wholly untenable; so much of the plea was clearly bad. For the rest, the plea was too wide in claiming justification on the ground merely that the acts were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement made by Her Majesty and a foreign Power. The narrower claim in argument that there must of necessity exist a power of compelling a subject to obey the provisions of a treaty of peace, and that a treaty for the avoidance of war was equivalent in law to a treaty of peace, was not the defence on the record; and their Lordships expressed no opinion upon it.

The question whether the Crown has by the Constitution the power to carry out the executory provisions of a treaty of peace to the detriment of private rights is then an open one. The case resembles the interference and destruction to which private rights of property are subject by the actual operations of war. If this be in virtue of some prerogative of the Crown as lord of war which suspends and supersedes the ordinary law, it would be natural that the like paramount power should extend to the conditions on which peace is to be restored. If, on the other hand, it be no case of prerogative, but a mere power not confined to the Crown or to war, limited by the proved necessity of the case, there appears nothing to prevent the application of the ordinary doctrine of the law, that the Crown has no power without Act of Parliament to confiscate and supersede existing rights in its dominions. Still less probable is it that a treaty for the avoidance of war is within the prerogative alleged. The question whether a particular treaty is one for averting war is on the face of it not one very fit for submission to a judicial tribunal; and to concede to the Crown the prerogative of conclusively declaring that a treaty was one for averting war, carries us back to a position akin to that which was ultimately held to be untenable in the seventeenth century. It may be added that the Newfoundland difficulty with France, out of

which *Walker* v. *Baird* arose, has been the subject of numerous Acts of Parliament, and that the *modus vivendi* referred to in that case was to have been confirmed by an Act of the Imperial Parliament; but the Bill was withdrawn on satisfactory legislation for the execution of the treaty having been submitted to the legislature of Newfoundland.[1]

[1] Holland's "Studies in International Law," 192.

IX

ALIENS

THERE is one notable exception to the rule that where reliance is placed on the authority of the Crown for the justification of an act, the power of the Crown to authorise the act may be examined: the case where the object of the act is an alien. To this case, the expression "Act of State" is limited by some writers, notably by Sir James Stephen in his "History of the Criminal Law," vol. ii. p. 61:

> "I understand by an act of State an act injurious to the person or property of some person who is not at the time of that act a subject of Her Majesty; which act is done by any representative of Her Majesty's authority, civil or military, and is either previously sanctioned or subsequently ratified by Her Majesty."

It is submitted that the terms of this definition must be closely followed; that it is not enough that the actor was in the service of the Crown and acting in his office or employment, or that he acted under the orders of a superior. To make an act of State which will oust the

jurisdiction of the Court the act must be made clearly the act of the Crown, the actor being made the representative of the Crown's authority, and this requires some real and unmistakable assumption of responsibility by the Crown. Subject to this condition being satisfied, it would appear that the nature of the act is immaterial; that the essential feature of this immunity is the *authority* from which it emanates; and that the Crown can throw its shield over every act done against aliens so as to protect the actor in all proceedings, civil or criminal. The question of place, however, seems to be material.

The leading case is *Buron* v. *Denman* (1848, 2 Ex. 167), an action brought against a naval officer for burning and destroying certain property of the plaintiff, an alien, on the coasts of West Africa, outside the British Dominions. The proceedings having been communicated to the Lords of the Admiralty and the Secretaries of State for the Foreign and Colonial Departments, they respectively by letter adopted and and ratified the act of the defendant. It was held that the act was an "act of State" (see also *Poll* v. *Lord Advocate* (1899, 1 Fraser, 823).

The rule clearly applies to acts done out of the British Dominions, whether on the high seas or in the territory of a foreign sovereign. It applies also where, though the act has been done within the British Dominions, the party complaining is an alien who has not been received into protection

within the realm. This is probably implied in the decision of the Privy Council in *Musgrove* v. *Chung Teeong Toy* (1891, A. C. 272), the case of an action brought against a customs officer for preventing an alien from landing in Victoria. The Privy Council declared that an alien excluded from any part of Her Majesty's Dominions by the Executive Government there, had no right of action in a British Court, and could not raise questions of the legality of the act complained of, whether the Crown had the power without Parliamentary authority to exclude aliens, and whether that power, if it existed, had been communicated to Colonial Governments. This decision does not go beyond the exclusion of aliens not received; it decides nothing as to the nature of an act of *expulsion*, and there is the best reason for thinking that an attempt by the executive to expel an alien residing in the realm could not, either on a writ of *habeas corpus* or in an action for damages, be sustained by the plea of *act of State*.[1] It seems the better opinion that an alien friend resident in British territory is in virtue of his local and temporary allegiance in the same position as a British subject so far as concerns the protection given by the jurisdiction of Courts of Law. In one respect the decision in *Musgrove* v. *Toy* (1891, A. C. 272) may extend the doctrine of act of

[1] The power of the Crown over aliens is discussed by Mr W. F. Craies in L. Q. R., vol. 6, p. 27; and Mr T. W. Haycroft, L. Q. R., vol. 13, p. 165 (see also Forsyth's "Cases and Opinions," pp. 341 and 468; and Pollock on "Torts," pp. 108 *et seq.*).

State. It had commonly been supposed that as the corollary of act of State is the responsibility of the State, the only authority competent to undertake that responsibility was the Crown acting in its Imperial capacity; and this was the basis of the extended argnments in the Court below, and of the judgment of the Supreme Court of Victoria (1888, 14 V. L. R. 349) that there was no act of State, since the authority of the Crown did not belong to the Colonial Governor either by general or special grant, and the act had not been ratified by the Crown in its Imperial capacity. The Privy Council held (1891, A. C. 282), that an alien having no right enforceable by action to enter British territory, it was unnecessary to determine the question argued upon the appeal—"whether the proper officer for giving or refusing access to the country has been duly authorised by his own Colonial Government, whether the Colonial Government has received sufficient delegated authority from the Crown to exercise the authority which the Crown had a right to exercise through the Colonial Government if properly communicated to it, and whether the Crown has the right without Parliamentary authority to exclude an alien." Conceding that the last question is immaterial, the others appear to go to the very root of the matter, if that matter is "matter of State." Is it meant that where the object is an alien, the act being an act of public authority, is *extra curiam* on that account merely,

and irrespective of whether the act is ordered or adopted by the Crown? If the Crown, acting through the Imperial authorities, expressly disavowed the act, would there still be no cause of action? If these questions are answered in the affirmative, we have got in this special case to the general doctrine of French law—that acts of public power done *bonâ fide* by any authority into whose department the matter would reasonably fall if the particular power existed are not remediable in the judicial tribunals, though such power does not in fact exist, or existing, has been in the particular case exceeded. Such an immunity of course has its analogy in English law in the immunity of judges acting within their jurisdiction from civil proceedings for acts done by themselves in their judicial capacity, and of persons in the military or naval service of the Crown from suits by persons in the like service for acts done in the intended execution of their duty (see Cases and Observations in Pollock on "Torts," 6th Ed., pp. 118-119). Are we to conclude that, as in French law, a personal *abuse*, as distinguished from an *excess* of power by the officer, would not be within the immunity? In the case of judges, the immunity extends to an *abuse* as well as to a mistaken exercise of power; it is well settled that the allegation of malice or corruption will not serve to found an action. In the case of naval and military officers, the question whether the immunity extends to acts

done maliciously and without reasonable and probable cause, is one upon which there is a difference of judicial opinion. *Dawkins* v. *Lord F. Paulet* (1869, L. R. 5 Q. B. 94) is an express decision that no action will lie even if the act is done maliciously and without reasonable and probable cause, and follows the opinions of Lord Mansfield and Lord Loughborough in *Sutton* v. *Johnstone* (1786, 1 T. R. 493). On the other hand, the House of Lords expressly refrained from affirming this doctrine in *Dawkins* v. *Lord Rokeby* (L. R. 7 H. L. 744), and Lord Penzance pronounced a hostile opinion; while in *Dawkins* v. *Lord F. Paulet*, Cockburn, C.J., delivered a strong dissenting judgment. The authorities and the *dicta* are fully considered by Mr W. S. Holdsworth in the "Law Quarterly Review," vol. 19, p. 222.

It may, however, be that the decision of the Privy Council that an alien has no *right* to enter British territory, is to be understood as disregarding the question of "act of State" altogether. But if the respondent's act was not unlawful, he had at least a *liberty* to enter, and the recent decision of the House of Lords in *Quinn* v. *Leathem* (1901, A. C. 495) hardly leaves it doubtful that a prohibition in the name of authority, and supported by power to make that prohibition effective, would be such a molestation of that liberty as would constitute an actionable wrong, unless it were justified by law or shown as matter of State to

be outside the competence of Court. And in any case, if the alien persisted in an attempt to enter, and it became necessary to use physical constraint, so that there were the elements of a trespass, the whole of the questions which the Privy Council declined to determine would become material. It would seem that unless, as has been suggested (*supra*), the decision involves an extension of the doctrine of act of State to acts done against an alien under colour of public authority though not actually authorised or ratified by the Crown, the case of *Musgrove* v. *Toy* has little practical importance, if indeed its authority can still be supported at all.

X

DIRECT EXTERNAL RELATIONS OF STATES

THE principle underlying these cases is expressed by a well-known passage in the judgment of the Privy Council in *Secretary of State for India* v. *Kamachee Boye Sahaba* (1859, 13 Moo. P. C. 22, at p. 75).

"The general principle of law was not, as indeed it could not with any colour of reason be disputed. The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer; such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."

The most obvious application of the principle would of course be to any proceeding in which the Courts were resorted to by a foreign State for the enforcement of a treaty entered into by the Crown with that State, or for any other redress involving a consideration and declaration of their international relations.[1] Such a case is, for obvious

[1] The recent case *In re Barnett's Trusts* (1902, 1 Ch. 847) required the Court to determine between the rights of the British Crown and the Austrian Government as to a fund in Court belonging to a deceased person who died without representatives, and presented therefore the rare case of a conflict between two sovereigns for judicial determination.

reasons, unlikely to arise directly, but there might be attempts to bring questions of the kind before the Court by proceedings against parties subject to the jurisdiction. In general, the proceeding could only be against some defendant who would rely on the authority of one Government or the other, and thereby put the matter *extra curiam.* But cases may be imagined in which that defence was not available and which might cause the Court some embarrassment. Cases of contested sovereignty over a particular place present themselves as an illustration; and it has been already suggested that the answer or claim of the executive as to the question of British or foreign sovereignty would be conclusive. A very interesting attempt to bring an international question to the arbitrament of a Municipal Court is the case of *In re Cooper* (1891, 143 U. S. 472). That case was one arising out of the seizures of Canadian vessels made by the United States authorities during the Behring Sea controversy, and was an application to the Supreme Court for a prohibition to the district Court for Alaska from proceeding to condemnation of the vessels seized for fishing in what were claimed to be the territorial waters of the United States. The application was accompanied by a suggestion from the British Government on behalf of the claimant presented by the Attorney-General of Canada; and it was strenuously contended on their behalf that where the Court was asked by the Executive

to exercise this judicial power of condemnation, it must be satisfied that that process was according to law, and could not therefore exclude from the enquiry the question whether the place in which the seizure took place was in fact part of the territorial waters of the United States. The Court refused the application, and while basing their decision on grounds not material to the present question, expressed the opinion that the determination of the extent of the United States territory belonged *prima facie* to the political departments; and that those departments having made and maintained in the controversy between the United States and Great Britain certain claims, it was not within the judicial duty, while negotiations were still pending, to decide whether the Government was right or wrong and to review the action of the political departments on the subject. They add (p. 503):

"We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the Court may be obliged, if those rights are dependent upon Acts of Congress or of a treaty and the case turns upon a question public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorising the executive to do so, to render judgment, 'since we have no more right to decline the jurisdiction which is given than to usurp that which is not given'" (see also *Little* v. *Barreme*, 2 Cranch, 190, 177, and *U. S.* v. *Rauscher*, 119 U. S. 407, 418).

Reference will be made later to the jurisdiction of the Supreme Court of the United States over controversies between States of the Union.

Within the British Empire the most notable examples of attempts to submit to the Courts the sovereign acts of State will be found in the numerous cases against the East India Company. The position of the East India Company was well described by Tindal, C.J., in *Gibson* v. *E. I. Co.* (1839, 5 Bing. N. C. 273):

> "It is manifest that the E. I. Co. have been invested with powers and privileges of a twofold nature perfectly distinct from each other—namely, power to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of India) power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of India."

The Company had no personal immunity from jurisdiction, and was frequently and successfully sued for matters arising out of its conduct as a trader. The fact that there was a justiciable *persona* led to many attempts to make the Company liable for acts done by it in its political capacity. Here at once several difficulties are apparent. First of all, there is the difficulty of distinguishing the capacity in which the Company was acting—whether it was trader or Government. Secondly, when it was established that the Company was acting in a governmental capacity, was

it totally exempt from all liability, or was it liable within a limited range, like a Municipal Corporation? If so, on what principle was its liability to be determined? Were its relations with its officers and servants to be determined by reference to the ordinary laws of contract, or to the special rules which govern the Crown and its servants? In respect of acts of oppression and excess, by the officers it appointed, clearly illegal in character, was the Company liable on the principle *respondeat superior*, or was it the mere instrument through which the Crown appointed officers, and so not their employer in the usual sense of private law?

In the case of the colonies we avoid these difficulties, for the Crown is the *persona* of the colony, and all the principles which apply to the Crown apply to the Colonial Government. In the case of the Company, the judgment in *Gibson* v. *E. I. Co.* (1839, 5 Bing. N. C. 262) assimilates the relation of the Company and its military officers, at any rate, to that of the Crown and its servants, in respect to their mutual rights; and this is followed in *ex parte Napier* (21 L. J. Q. B. 332) and *Grant* v. *Secretary of State for India in Council* (1877, 2 C. P. D. 445). As to wrongful acts done by the officers of the Company acting in their governmental capacity, there would have been no shock to any legal principle in holding that the Company was not liable for them, whatever might be the liability of the officers them-

selves. The establishment of the liability of governmental corporations in general for the torts of their servants belongs, in fact, to the last year of the Company's existence as a governing body.[1] However, it may be conceded that for actual torts committed by its officers and servants the Company was liable on the ordinary principles of master and servant. But in addition to its *administrative* powers, the Company had powers which, in distinction therefrom, have been conveniently described as *sovereign*—the power to acquire and govern territory, to raise and maintain armed forces, to make peace and war, and to establish federal relations with the native princes of India. From the decision in the *Nabob of the Carnatic* v. *E. I. Co.*, in 1793, it has been well established that the action of the Company in these matters, however closely it might simulate breaches of contract or tort, could no more be brought to the arbitrament of the Courts of England or of India than the transactions of independent sovereigns; and a long series of cases against the East India Company form our chief authorities on, and illustrations of, act of State. The same principle, of course, equally protected the officers of the Company from personal liability (*Elphinstone* v. *Bedreechund*, 1830, 2 State Trials, N. S. 379), and has been applied in the case of actions against the

[1] By the decisions in *Southampton and Itchin Bridge Coy.* v. *Southampton Local Board* (8 E. & B. 811) and *Ruck* v. *Williams* (27 L. J. Ex. 357), both in 1858.

Secretary of State for India in Council, who is for many purposes the statutory successor of the Company. The distinction between the two classes of case—of delegated sovereign power and mere administrative action—is illustrated by a passage in the judgment of the Privy Council in *Secretary of State* v. *Kamachee Boye Sahaba* (1859, 13 Moo. P. C. 22, at p. 77):

"What is the real character of the act done in this case? Was it a seizure by arbitrary power, on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State—an act not affecting to justify itself on grounds of municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore in trust for those who by law might be entitled to it on the death of the last possessor. If it were the latter, the defence set up (*i.e.* act of State), of course, has no foundation."

A case held to fall within the latter principle was *Forrester* v. *Secretary of State* (1872, L. R. Ind. App. Supp. Vol. p. 10). It is unnecessary to consider these cases at large; they are summarised in Ilbert's "Government of India," pp. 174-177, and in a note by the same author in Campbell's "Leading Cases," vol. i. pp. 821-827.[1] It will be

[1] The cases are:—*The Nabob of the Carnatic* v. *E. I. Co.* (1793, 1 Vesey, Jr. 56, and 4 Bro. C. C. 100); *E. I. Co.* v. *Syed Ally* (1827, 7 Moore Ind. App. 555); *Secretary of State for India in Council* v. *Kamachee Boye Sahaba* (1859, 13 Moo. P. C. 22); *Rajah of Coorg* v. *E. I. Co.* (1860, 29 Beav. 300); *Rajah Salig Ram* v. *Secretary of State* (1872, L. R. Ind. App. Supp. Vol. p. 119); *Sirdar Bhagwan Singh* v. *Secretary of State* (1874, L. R. 2 Ind. App. Cas. 38); *Forrester* v.

noticed that the doctrine of the relation of independent sovereign States has been extended to States in the anomalous condition of the Indian princes. Further, although the cases in which act of State has been raised were cases against the East India Company, the doctrine would apply equally if they were plaintiffs, and whether the defendant submitted to the jurisdiction or not; for where it is the character of the cause, and not the privilege of the defendant, which deprives the Court of jurisdiction, no submission of parties can make the Court competent to entertain the suit.

In the United States, the "sovereign powers" of diplomacy and war belong to the national Government and not to the States. But the Constitution does not exclude the possibility of disputes between the States analogous to those between independent States, and of unfriendly policy which may lead to serious consequences. As the United States Constitution confers jurisdiction on the Supreme Court in cases of controversies between States, this has sometimes been thought to stand for all inter-state disputes as the constitutional substitute for war and diplomacy, and consequently to extend to all disputes which might endanger the peace of the Union, or the cordial relations of the States. The Courts, however, have

Secretary of State (1874, L. R. Ind. App. Supp. Vol. 10); *Doss* v. *Secretary of State* (1875, L. R. 19, Eq. 509); *Grant* v. *Secretary of State* (1877, 2 C. P. D. 445).

declined to undertake the determination of mere political issues, however grave, of controversies which "on the settled principles of public law are not subjects of judicial cognisance"; such disputes, not arising out of matters of legal right, "do not present a case appropriate for the exercise of judicial power." The most prominent matter of litigation between States has been the adjustment of their boundaries; and in one of the earliest of these (*Rhode Island* v. *Massachussetts*, 12 Peters, 657), it was contended that the question was one of a political nature involving jurisdiction and sovereignty, and that there was no law by which it could be determined; for such controversies were obviously outside municipal law, and international law was not applicable, "for international law applied to the nation (*i.e.* the United States), and not to the States; and that the law itself is not the subject of administration by judicial tribunals when it operates on communities." But the Court treated the matter as one arising on the construction of a contract relating to property —this was the immediate substantive matter of dispute and the determination of sovereignty and jurisdiction was merely incidental and consequential. Whether this view commends itself or not, it is not to be forgotten that before the Revolution, questions of boundary were determined by the King in Council upon legal arguments; and the well-known case of *Penn* v. *Baltimore* is a case of the judicial determination of colonial boundaries

by the Court of Chancery. In any case, the ascertainment of territorial boundaries is of all international matters that which is best fitted for the arbitrament of an impartial tribunal, and in the United States has been the State controversy in which the jurisdiction of the Supreme Court has been most frequently invoked (see the List of Cases cited in *U. S.* v. *Texas*, 1892, 143 U. S. 621). But the Court has declined to take jurisdiction of suits between the States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their Governments, *e.g.* an interstate arrangement for the mutual surrender of criminals (*Kentucky* v. *Dennison*, 24 Howard, 66). Leading cases in which the Court has declared that the matter of complaint was political rather than legal, are *Cherokee Nation* v. *State of Georgia* (5 Peters, 1), where an injunction was sought against the State in respect to the execution of its statutes in territory claimed by the Indians; and the *State of Georgia* v. *Stanton* (1867, 6 Wall, 50), where an injunction was sought to restrain the execution of the Federal Reconstruction Act "inasmuch as such execution would annul, and totally abolish the existing State Government of Georgia, and establish another and different one in its place." In the latter case, the Court observes that the Bill called for the judgment of the Court on political questions and upon rights, not of person

or property but of a political character, for the rights asserted were "the rights of sovereignty, of political jurisdiction, of corporate existence as a State, with all its constitutional powers and privileges. No case of private property infringed or in danger of actual or threatened infringement is presented by the bill in a judicial form for the judgment of the Court." The Court has also declared that in order to entitle a party to a remedy, "the rights in danger must be rights of persons or property, not merely political rights which do not belong to the jurisdiction of a Court either in law or equity." (*Wisconsin* v. *Pelican Insurance Co.* 127 U. S., at p. 288). It thus seems that the Court while guarding itself from laying down any precise rule of exclusion refuses jurisdiction not only in questions of mere policy outside law altogether, but also in those relations of international law which from their nature belong only to political entities, matters of power and government and not of right and property.

Two recent cases in the Supreme Court show the jurisdiction over controversies between States at perhaps its full extent. In *Missouri* v. *Illinois and the Sanitary District of Chicago* (1900, 180 U. S. 208), the plaintiff State filed a bill in the Supreme Court for an injunction against the defendant State, and the Chicago District as one of its agents, in respect of a nuisance caused by the discharge of the sewage of Chicago City, through artificial channels contrary to the natural

flow of such sewage, into the Mississippi River in Missouri, to the pollution of the water supply and other detriment of the State of Missouri, its towns and inhabitants; the District to be enjoined from discharging and the State from issuing its authority to discharge the sewage. The Court held on demurrer, that the bill was maintainable; that if the health and comfort of the inhabitants of a State were threatened, the State was the proper party to represent them.

"If Missouri were an independent and sovereign State, all must admit that she could seek a remedy by negotiation, and that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general Government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy we think is found in the constitutional provisions we are considering."

As to the contention that the State of Illinois was not a proper defendant, the answer was that it was State action and its results that were complained of; there was no complaint that the district of Chicago was acting without or in excess of authority, and it was alleged that the district was acting as a governmental agency, as a public and not as a private corporation.

In the *State of Kansas* v. *State of Colorado* (1901, 185 U. S. 125),[1] the plaintiff State sought

[1] I am indebted to the "Notes on Suits between States," by Mr Carman F. Randolph of the New York Bar, for calling my attention to this case before it was reported.

an injunction against the diversion of the waters of the Arkansas River, which rises in Colorado and traverses Kansas. The complaint was that the defendant State was authorising the diversion of waters for irrigation purposes in such quantities as to cause enormous injury to land in the plaintiff State, so that much of such land would "be utterly ruined," "become deserted" and "be part of an arid desert." The plaintiff State claimed as proprietor of a portion of the land concerned, but its principal interest was as the guardian of the rights of its citizens. It was held that the State was competent to sue in this capacity; and that the suit was rightly brought against the State under whose authority the diversion was to take place. Further the Court held that the position assumed by the defendant State on the demurrer, that a State may as an incident of its sovereignty prevent the flow to the lower State of all the waters of an inter-state stream, was not one which could be maintained.[1]

The way for those decisions has been paved by the general acceptance of limitations upon the territorial power of the State. It appears generally agreed that where a river flows through two States, acts done in one State to the detriment of land in another, whether through flooding the upper lands

[1] The case of *Emperor of Austria* v. *Kossuth & Day* (1861, 30 L. J. Ch. 690), referred to above, is an example of a foreign sovereign allowed to sue in an English Court as the guardian of the rights of his subjects.

by the erection of a dam, or in the case of the lower lands, the deprivation of the supply of water or of the flow of the stream, are torts committed in the State where the damage was suffered, and are actionable in the State Courts; and, if the parties are citizens of different States, in the federal Courts (Angell on "Watercourses," sec. 507 *et passim*; *Watts* v. *Kinney*, 6 Hill, N. Y. 82; *Thayer* v. *Brooks*, 17 Ohio, 489; *Rundle* v. *Delaware and Raritan Canal*, 1 Wallace, Jr. 275, Federal Circuit Court). It seems to follow from this that no authority derived from the law of the State in which the acts are done could legalise the injurious consequences suffered in another State (*Holyoake Water Power Co.* v. *Connecticut River Co.*, 22 Blatchford, 131). We are thus brought to the position that no State of the Union can throw the shield of protection over external injuries committed in its name in another State of the Union. Acts of high policy which we call acts of State lie outside the scope and capacity of the States, and belong only to the Nation. The striking features about such cases as *Missouri* v. *Illinois* and *Kansas* v. *Colorado* are, of course, *first*, that there is in the federal Courts a tribunal which can give an effective remedy for such wrongs; *secondly*, that the jurisdiction over controversies between States belonging to the Supreme Court enables it to deal with such mischief at its source—the Court deals not merely with the subject or agent, but with the principal, the State, while the plaintiff State is

deemed competent to come in and protect not only its property, but the rights and interests of its citizens. In this jurisdiction over a State we have a jurisdiction which goes beyond the jurisdiction of ordinary Municipal Courts, and may yield some very important results in Canada and Australia, where, as in the United States, there is a tribunal with jurisdiction over inter-State controversies. In Australia, in particular, the conflicting claims of New South Wales, Victoria, and South Australia to the use of the waters of the River Murray, and the conflicting interests of navigation, on the one hand, and water conservation and irrigation—represented as they are broadly by distinct States—on the other, present a highly complicated set of questions of jurisdiction and of application of law. Litigation is threatened at the suit of South Australia against the State of Victoria, and unless negotiations succeed in bringing about a compromise, the High Court will be called on to determine a number of questions of the utmost interest and importance, both from the constitutional and international point of view.

XI

CIVIL DISCORD IN FOREIGN COUNTRIES

In addition to acts of State depending on the authority of the foreign sovereign, which will be treated under the next head, there are cases of claims arising out of civil discord, as to which it cannot be doubted that the armed encounters and forcible restraints of conflicting forces pursuing a public end in a foreign State are as much beyond the cognisance of Courts of Law as are the incidents of public war between independent States. For the purpose of ascertaining and defining the acts which are thus removed from forensic jurisdiction the interpretation of "acts of a political character" under the Extradition Acts may perhaps be usefully resorted to. It is suggested that an act could not be the subject of civil proceedings in England if it was such that, were it a crime and within the terms of an Extradition Treaty between England and the country in which it was committed, it would not be extraditable on account of its political character. In *re Castioni* (1891, 1 Q. B. 149) the Court adopted Mr Justice Stephen's definition of "offence of a political character" as incidental to and forming part of political disturb-

ances; and explained *In re Meunier* (1894, 2 Q. B. 415) to mean that "there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other." It is submitted that the immunity suggested is entirely independent of the question whether our Sovereign has recognised the existence of the war itself, or has recognised either party as a belligerent community. Such acts done *animo belligerandi* are entirely beyond the familiar subjects of tort and crime.[1] If, however, it can be shown that the acts, though done in the course of a political disturbance, are not really referable to it, but are substantive acts of spoliation or vengeance, then just as they would for purposes of extradition lose their political immunity (*In re Castioni*, 1891, 1 Q. B. 149, 161), so they would as against any person justiciable be treated as wrongs. This is declared even in the case of a conqueror, by Lord Romilly, M.R., in the *Rajah of Coorg's Case* (*Veer Rajundar Wadeer* v. *East India Co.*, 1860, 30 L. J. Ch. N. S. 226).

Of course, from the point of view of the sovereign in whose territory such acts are committed, and in his Courts, the matters may stand on a different footing—the man who is charged with murder or arson or robbery cannot in accordance with a well-known principle rely

[1] For a discussion of the *animus belligerandi* or *animus furandi* in Extradition see *re Tivnan* (1864, 5 B. & S. 645). See on the *mens rea*, Forsyth, "Const. Law," 370-371.

on a defence of treason. So Stephen ("Hist. Crim. Law," vol. ii. pp. 70-71), says:

"If a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Wherever a house was burnt for military purposes, arson would be committed. To take cattle, etc., by requisition, would be robbery."

It is noteworthy, however, that in the United States, the fact that the Federal Government had recognised the confederates as a military organisation with certain belligerent rights, was deemed by the Courts to carry with it immunity in the United States Courts for acts done by the confederate forces *bona fide* for the purposes of the war (*Williams* v. *Bruffy*, 1877, 96 U. S. 176; *Ford* v. *Surget*, 1878, 97 U. S. 594; and *Christian County Court* v. *Rankin*, 87 American Decisions, 507, setting out a list of cases illustrating the rule that belligerent acts are not the subject of judicial proceedings).

An attempt was made to obtain a decision of the Privy Council on the like subject in reference to the events of the South African war; but the Board considered the matter in the form in which it was presented to be an abstract question falling outside the cases in which special leave to appeal ought to be given (*The King* v. *Louw*, 1904, A. C. 412).

In the *Duke of Brunswick* v. *The King of*

Hanover (1844, 6 Beav. 1, 59-60, and 1848, 1 H. L. 1), the doctrine that acts done in the course of civil discords are not the subject of municipal jurisdiction was assumed, and given a somewhat extended application. In that case there had been a revolution in Brunswick in 1830, and the Duke deposed; in 1831, the Duke of Cambridge, and later the defendant, was appointed guardian of his fortune and property; and the bill in equity, brought in 1848, claimed an account of the property received and administered by the defendant. The question of the exemption of the defendant as a foreign sovereign, which was determined in favour of the defendant, has been already referred to, but apart from that immunity, Lord Langdale, M.R., was of opinion that the instrument appointing defendant, and alleged by plaintiff to be null and void, was as the sequel to a political revolution, "connected with political and State transactions, and is itself what in common parlance is said to be a State document, and evidence of an act of State." In the House of Lords, the sovereign status of the defendant, and the State or political character of the matters taken together, were treated as putting the matter out of Court. But, at any rate, the character of the matters was treated as conclusively disposing of any jurisdiction which the Court might have by reason of the defendant being a British subject as well as a foreign

sovereign: and Lord Campbell (at p. 26) expressly lays it down that in his opinion, the bill was no more sustainable against the prior guardian, the Duke of Cambridge, a subject of the British Crown and no foreign sovereign, than it was against the King of Hanover.

XII

ACTS UNDER THE AUTHORITY OF A FOREIGN SOVEREIGN

Acts done in foreign territory are commonly not cognisable in our criminal jurisdiction at all, and in the civil jurisdiction, no action can be brought upon them if they are justifiable or excusable under the *lex loci*. If, therefore, the authority of the foreign sovereign is, as it commonly would be, a good answer to all proceedings in his Courts, it is obvious that there is a good defence to any proceedings in our Courts without resorting to act of State. Such a case is *Carr* v. *Fracis Times & Co.* (1902, A. C. 176), where a seizure was made by a British officer under the authority of the Sultan of Muscat, in the territorial waters of that State, and the legality of the acts by the *lex loci* was held to dispose of the action. Something is said in the judgment about the act of the defendant under the proclamation of the Sultan, being an "act of State"; but as the act was held to be lawful by the law of Muscat, it was really unnecessary to go further.[1]

[1] Cf. *Ireland* v. *Chapman* (1877, 3 V. L. R. (L.) 242).

The defence "act of State," as already pointed out, treats the legality of the act as beside the question, and its significance would be apparent in the case of a complex sovereignty where the monarch had not the sole power of declaring and altering the law. (See *Duke of Brunswick* v. *King of Hanover*, 1848, 1 H. L. 1, *passim*).

An act done in the territory of a foreign State on behalf of that State, authorised by one competent internationally to give authority, cannot be the subject of proceedings in our Courts, though it is shown to be unlawful by the law of the country where it was committed, and (semble) though it is not an act warranted by international law.

Authorisation of the act or adoption of it by the State is, however, necessary; it is not enough that the act was done by a public servant in his public capacity. In *Hart* v. *Gampach* (1872, L. R. 4 P. C. 439), an action of defamation was brought for statements contained in a communication by defendant, as Inspector-General of Chinese Customs, to the Tsung-li-Yamen. The action was in the Supreme Court for China and Japan, and the defendant pleaded that he and the plaintiff were both in the service of the Chinese Government, and that it was defendant's duty to make such representations, write such letters, do such acts, and pay such sums of money as should seem fit to him; that what he did or did not do in relation to the plaintiff was in the exercise of

his lawful authority in pursuit of such employment, and in the exercise of his duty as a servant of the Chinese Government, and not otherwise. On this plea it was argued that a Municipal Court had no jurisdiction to entertain complaints of acts done in China by defendant in his official character as a functionary of the Chinese Emperor. In answer to this, it was pointed out that there was no averment that the Chinese Government had adopted the acts of defendant as acts of State. The Privy Council held that the defamatory communication of the defendant could not be regarded as the executive act of the Chinese Government, and there was nothing shown to indicate that Chinese law accorded any privileges in or exemption from suit to the Ministers and servants of the Government. This was held sufficient to dispose of the argument that public policy intervened to prevent such actions from being brought in a British Court. The parties in this case were both British subjects; but this could not affect the matter. An action in respect of a libel published abroad may be brought in England, though both plaintiff and defendant are aliens (*Machado* v. *Fontes*, 1897, 2 Q. B. 231); and "act of State" is a defence open in a proper case to a British subject not less than to a foreigner (*Dobree* v. *Napier*, 2 Bing. N. C. 781; *Carr* v. *Fracis Times & Co.*, 1902, A. C. 176).

The case of acts done by order of a foreign sovereign beyond the limits of his own territory

presents more difficulty. Acts done in territorial waters may certainly be regarded as done within the territory, and governed by whatever principles apply to the case—in *Carr* v. *Fracis Times & Co.* the Lord Chancellor is emphatic that an alleged tort committed in the territorial waters of a foreign sovereign is for purposes of law committed in the territory (p. 181). Where acts are done beyond the territorial waters you are at once met by the limits of sovereignty, and by the anomaly of permitting a foreign sovereign to withdraw from jurisdiction acts done against the law of the sovereign of the forum. Where the acts are done upon the high seas the decision in *Dobree* v. *Napier*[1] suggests a rule. In that case an action was brought against Sir Charles Napier for the seizure of plaintiff's vessel on the high seas. The defence was that Sir Charles Napier was admiral of the forces of the Queen of Portugal, and that the plaintiff's ship was taken while running a blockade proclaimed and established in a war between the Queen of Portugal and her enemies, and that the vessel had been duly condemned as prize in a Portuguese Court. The Court held that as to the legality of the capture they could not go behind the Prize Court's decision—"the sentence of a foreign Court of competent jurisdiction, condemning a neutral vessel taken in war, as prize, is binding and conclusive on all the world." The only question remaining was whether, having

[1] 1836, 2 Bing. N. C. 781.

regard to the fact that the Foreign Enlistment Act made it an offence to enter the service of a foreign sovereign at war, the defendant could rely upon the commission which he set up. The Court held that the legality of the seizure by the Queen of Portugal being undoubted, the defendant, her agent, could not be made liable civilly for the act done under her commission, whatever might be his liability to the British Crown for unlawfully undertaking foreign service. The act of the defendant was actually committed in the territorial waters of the Queen of Portugal, but the locality of the act does not seem to have been treated as material. It clearly follows from *Dobree* v. *Napier* that acts done on the high seas by order of a foreign sovereign are not justiciable in our Courts at the suit of a person damaged, where the acts are in accordance with international law; and that the decision of a Court of Prize that they are in accordance with international law conclusively determines the matter. That, however, leaves untouched the question whether the foreign sovereign can throw the shield of his authority over acts done on the high seas, whether they are or are not in accordance with international law, or over acts done in the territory of a foreign State. In *R.* v. *Lesley* (1860, 29 L. J. M. C. 97), a ship-master was indicted and convicted for assault and false imprisonment in a British ship in Chilian waters and on the high seas. The defence was that the defendant was

under contract with the Chilian Government to convey political prisoners from Chili to England, and he argued that as the expulsion was an act which the Chilian Government might lawfully carry out, he, acting on their authority and on their behalf, could not be held liable. The Court for Crown Cases Reserved held, on the authority of *Dobree* v. *Napier*, that for acts done in Chilian waters the authority of the Chilian Government was sufficient, as it probably would be for acts done on a Chilian ship outside those waters; but that the authority did not protect acts done on a British ship contrary to English law. In other words, acts wholly done on a ship outside territorial waters are treated as done within the territory to which the ship belongs; and no sovereign can justify acts done in the territory of another contrary to those laws. But there may often be difficulty in determining in which territory an act was committed (*R.* v. *Keyn*, 2 Ex. D. 1); and in any case acts cognisable and regulated by international law, and done in accordance with international law, must be outside the principle of *Lesley's Case*. Further, the decision in *Lesley's Case* probably means no more than this: that the mere authority of the foreign sovereign, irrespective of the subject-matter and the other facts of the case, does not constitute a justification, or put the matter out of Court. There is, in fact, a distinction to be drawn between acts done or purporting to be done

in the ordinary course of a country's law which is limited by the sovereignty of that country; and, on the other hand, acts, to which we apply the term "State" or "high policy" or "sovereign," which are recognised as referable to the relations of States *inter se*, and as to which it is immaterial what is the attitude of the law of either of the countries concerned. Of the first class, the facts in *Lesley's Case* are an illustration. Another illustration may be found in the judgment of Cotton, L.J., in *Vavasseur* v. *Krupp* (1878, L. R. 9 Ch. Div., at p. 359):

> "Undoubtedly, if parties in England are doing that which is an infringement of a patent, they cannot justify it by saying that some one (*i.e.* a foreign sovereign), who has no power to authorise them to use the patent, has authorised them to do so."

Illustrations of the acts of the second class may be found in such an armed invasion of territory as the Jameson Raid. If in that case the British authorities had avowed and adopted the acts of Dr Jameson and his associates, then, though a national act of invasion in the circumstances might have been treacherous and disgraceful to a civilised power, the actual actors would not upon principle have been punishable in any Court of the injured State.

The classical case upon this subject is *M'Leod's Case*, arising out of the Fenian invasion of Canada in 1838. In the course of the conflict between the

Canadian and Fenian Forces at the boundary line of United States and Canadian territory, the Canadian forces crossed the line and attacked a vessel called the *Caroline*, forming part of the Fenian forces, which was lying at her moorings in American waters. The vessel was sunk, and some lives were lost. The British Government assumed responsibility for the act, and the United States demanded explanations, which were given and accepted. In 1841, M'Leod, who was a member of the colonial forces engaged in the *Caroline* incident, was in New York, and was there arrested and indicted for murder. Great Britain at once addressed herself to the Federal authorities and demanded M'Leod's surrender, on the grounds that "the transaction on acount of which M'Leod has been arrested, and is to be put on his trial, is a transaction of a public kind, planned and executed by persons duly empowered by Her Majesty's colonial authorities to take any steps and do any acts which might be necessary for the defence of Her Majesty's territories, and for the protection of Her Majesty's subjects; and that consequently those subjects of Her Majesty who engaged in that transaction were performing an act of public duty for which they cannot be made personally answerable to the laws and tribunals of any foreign country" ("State Papers," 1840-1, vol. xxix., p. 1127). It was added that "the question is one especially of a political and international kind, which can be discussed and settled only between the two

Governments, and which the Courts of Justice of the State of New York cannot by possibility have any means of judging, or any right of deciding." In this view, the Government of the United States entirely concurred, the Secretary of State (Mr Daniel Webster) writing:

"The Government of the United States entertains no doubt that after this avowal of the transaction as a public transaction authorised and undertaken by the British authorities, individuals concerned in it ought not by the principles of public law and the general usage of civilised States to be holden personally responsible in the ordinary tribunals of law for their participation in it" (Ibid. p. 1131).

And again:

"Whether the process be civil or criminal, the fact of having acted under public authority and in obedience to the orders of lawful superiors, must be regarded as a valid defence; otherwise, individuals would be holden responsible for the injuries resulting from the acts of Government and even from the operations of public war" (Ibid. p. 1141).

Mr Webster was careful to point out that the case had no connection with the question in dispute between the two Governments as to whether the British attack on the *Caroline* was or was not justifiable (Wharton's "Dig. Int. Law," sec. 821). While the Governments were thus in agreement, the matter was proceeding in the Courts of New York, and an application sup-

ported by the Federal authorities was made to the Courts of the State of New York for the defendants' discharge on a writ of *habeas corpus*. The discharge was refused in an elaborate judgment which not merely determined that the case was not one for a *habeas corpus*, but was at pains to show that the avowal of M'Leod's acts by the British Government was no defence in a prosecution for homicide.

"Persons acting in the territory of another nation in time of peace, though upon the command of their Government and being beyond the jurisdiction of the Government, for which they act, must be treated as proceeding on their own responsibility, and may be prosecuted as criminals in the Courts of the nation thus entered, though their own Government adopts and approves their crime. Laws of a nation do not extend beyond their own territory" (*People* v. *M'Leod*, 1841, N. Y. 1 Hill, 377; 37 American Decisions, 329).

Ultimately M'Leod was tried and acquitted, and an Act of Congress was passed enabling the Federal authorities to remove such proceedings out of the State Courts into the federal jurisdiction (Act of 29th August 1842; Revised Statutes of the United States, sec. 753). The judicial power is therefore now in the hands of that Government which has the diplomatic responsibility. The views of the Court in *People* v. *M'Leod* have been generally condemned; and

in 1846, Webster, in a speech in the Senate, denounced them in the following terms:

"On the peril and risk of my professiona reputation, I now say that the opinion of the Court of New York in that case is not a respectable opinion, either on account of the result at which it arrives, or the reasoning on which it proceeds" ("Wharton Dig. Int. Law," sec. 350).

In fairness, however, it should be noticed that according to Greville:

"Lord Lyndhurst talking over the matter with Sir Herbert Jenner and Justice Littledale, said it was very questionable if the Americans had not right on their side, and that he thought in a similar case here, we should be obliged to try the man, and if convicted, nothing but a pardon could save him" ("Greville, Memoirs," 2nd Series, vol. i. p. 384; cited, "Wharton Dig. Int. Law," sec. 21).

The most distinguished opponent of the view put forward by the British and accepted by the United States Government was Mr Calhoun who, agreeing with them that the case was not one of war, considered that *unless the attack were justifiable internationally*, the British Government could not throw the cloak of protection over its agents and secure them from responsibility to the Courts of New York.

"To admit to its full extent the principle that we cannot subject to our municipal law aliens who violate such laws under the direction of their

sovereign, would be to give such sovereigns jurisdiction over our soil, and to surrender *pro tanto* our territorial sovereignty."

He puts the case of foreign emissaries sent to blow up fortifications in the United States in time of peace, or other secret and violent acts, and asks whether the most authentic papers from Great Britain would make it a public transaction and shield the villains from responsibility to American laws and tribunals? It is perhaps difficult to draw the line, and it may be conceded that the case suggested by Calhoun, as well as other cases that may be imagined—assassination, or pilfering of State documents—could not be protected. The case for immunity has never been put higher than the public and open employment of force, and there the legitimate limits of act of State in this connection may lie. Perhaps a further limitation must be added —that the acts themselves must be of a kind which international law recognises as lawful in case of actual war. It has been pointed out that English Courts certainly do not "admit to its full extent the principle that we cannot subject to our municipal laws aliens who violate such laws under the direction of their sovereign."

XIII

TREATIES AS SOURCES OF RIGHT

If, on the one hand, the Crown cannot alter the law by treaties with foreign States, so as to deprive subjects of their rights, it is, on the other hand, generally, if not universally, true that a subject cannot as against the Crown rely on the provisions of a treaty as the source of any right which the law does not give him by some other title. This has been judicially determined (see *Cook* v. *Sprigg*, 1899, A. C. 572; *Rustomjee* v. *The Queen*, 1876, L. R., 1 Q. B. 487; 2 Q. B. 69; *Baron de Bode's Case*, 1851, 3 H. L. C. 449). The dicta in *Cook* v. *Sprigg* have already been considered,[1] and reasons have been suggested for thinking that international agreements attending a cession of territory may stand in a special position. In the *Baron de Bode's Case*, the actual decision is no more than that, a statute having established a particular mode of asserting claims, and a particular tribunal for their determination, the remedy by a Petition of Right was excluded. The case of

[1] *Vide ante*, p. 78, *et seq.*

Rustomjee v. *The Queen* is, however, exactly in point, and seems to illustrate what English lawyers somewhat hastily regard as a commonplace—that this extraordinary remedy against the Crown, the Petition of Right, exists not for the enforcement of claims binding in conscience, but for the determination of strict legal rights. In that case the suppliant presented a petition claiming a share in a sum paid by the Chinese Government to the Crown under a treaty of peace which amongst other things provided for the compensation of the British creditors of some insolvent Chinese merchants. It was held that the petition did not lie, and Blackburn, J., said:

"I don't think that it can possibly be said that when the Queen has as a high act of State made a treaty and received money in consequence of a high act of State, the mode of enforcing it is in any way enforceable by a Court of Law, or subject to the findings of a jury" (pp. 495-496).

Lush, J., said:

"I think that all that is done under that treaty is as much beyond the domain of municipal law as the negotiation of the treaty itself" (p. 497).

In New Zealand it appears to be settled that Maori claims to native lands depending directly and solely upon the treaties of peace between the Crown and the native tribes, are so far removed from judicial conflict that the mere assertion of the Crown is sufficient to oust the jurisdiction

of the Court (*Wi Parata* v. *Bishop of Wellington*, 3 N. Z. Jurist, N. S. S. C. 72).

"There can be no known rule of law by which the validity of dealings in the name and under the authority of the sovereign with the native tribes of this country for the extinction of their territorial rights can be tested. Such transactions began with the settlement of these islands, so that native custom is inapplicable to them. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice" (*Nireaha Tamaki* v. *Baker*, 1894, N. Z. 12 L. R. 483. And see *Teira Te Poea* v. *Roera Tareha*, 1896, N. Z. 15 L. R. 91).

It is an *a fortiori* case that an alien cannot rely on any treaty as the source of rights against the Government of the country. In the United States, treaties are explicitly regarded as part of the law of the land and not as mere matters of State, though their executory provisions may require Acts of Congress to carry them out. But even here, the Supreme Court has affirmed in the strongest manner that it will not allow an appeal to it by or at the instance of a foreign Government or of foreign subjects as against the interpretation of the political departments. The case of *In re Cooper* (143 U. S. 472) has been referred to elsewhere.[1] In the *Chinese Exclusion Case* (130 U. S. 581), the Court held that the treaty with China (1880) providing for the re-

[1] *Vide ante*, p. 36.

admission of Chinese subjects returning to the United States with permits, had ceased to be part of the law of the United States because it was inconsistent with an Act of Congress of later dates (1888). But they cite with approval the following observations of Curtis, J., in *Taylor* v. *Morton* (2 Curtis, 454, 459), which take a higher ground:

"Whilst it would always be a matter of the utmost delicacy and gravity to refuse to execute a treaty, the power to do so was a prerogative of which no nation could be deprived without deeply affecting its sovereignty; but whether a treaty with a foreign sovereign had been violated by him, whether the consideration of a treaty had been voluntarily withdrawn by one party so as to be no longer obligatory on the other, and whether the views and acts of a foreign sovereign manifested through his representative had given just occasion to the political department of our Government to withhold the execution of terms contained in a treaty, or to act in direct contravention of such terms, were not judicial questions; that the power to determine them was not confided to the judiciary, which has no suitable means to execute it, but to the legislative and executive departments of the Government, and that it belongs to diplomacy and legislation, and not to the administration of the existing laws."

XIV

TREATIES IN RELATION TO CONTRACTS AND PRIVATE DEBTS

THE cases dealt with hitherto are cases in which the matter is one of State from the beginning, and where the relations with which the Court is called on to deal, merely simulate the legal relations of private persons. But the case of *Rustomjee* v. *The Queen* (1876, L. R. 1 Q. B. 487, 2 Q. B. 69), suggests a more difficult case in which a matter, originally one of law between private parties, may perhaps by subsequent acts or events become one of State. In that case it was held that the claimant, a British subject, had no legal claim against the Crown in respect of money paid by the Chinese Government in compensation for the default of certain Chinese debtors. It is not clear that the payment was expressed to be by way of *satisfaction* of the claims of British subjects; but that would not have affected the liability of the Crown. Suppose that the treaty had provided that the payment was to be by way of satisfaction; or suppose—to take the case of the treaty of peace between

England and Denmark that was the subject of equity proceedings in *Weymberg* v. *Touch* (1669, 1 Ch. Ca. 123), and *Troner* v. *Hassold* (1670, 1 Ca. Ch. 173)—that the two Crowns agree that the claims of subjects of each shall be set off against claims of the subjects of the other—what, in such a case, is the position of the creditors at law? In an action in an English Court by a British creditor against an alien debtor, will the plea of such a treaty make the case one of State ousting the jurisdiction of the Court? In the case of a claim by a British subject against an alien debtor it is practically certain that "matter of State" would be no defence. The question would be simply whether the Crown could by treaty generally or by treaty of peace take away the rights of subjects, the question already discussed in relation to *Walker* v. *Baird* (1892, A. C. 471).[1] (See also the *Parlement Belge*, 4 P. D. 129, judgment of Sir R. Phillimore.)

In the case of a claim by an alien creditor against a British debtor, the case is more difficult. It is hardly doubtful that where there has been a treaty of peace between the King and a foreign State, subjects of the foreign State are in our Courts concluded by the terms of the treaty, and probably the rule would extend to any case of treaty—the alien could not raise questions of the power of his own sovereign or

[1] *Vide ante*, p. 89, *et seq.*

our King under the foreign or English law. It might, no doubt, be argued as a general principle, even apart from such obviously international matters, that where a British subject has by the act of the Crown been prohibited or excused from the payment of a debt to an alien, his case falls within the principle applied in tort and crime that acts done by command of the Crown to the detriment of aliens abroad are not cognisable in Municipal Courts. But it is probable that that principle does not extend to claims of a purely contractual nature arising between private parties. The power of the Crown to confiscate the debts of aliens has always been limited to the case of alien enemies, and even that is clearly a power exercised according to law, *e.g.* it can be exercised only after inquisition taken, so that the King must complete his title before the conclusion of peace (see Chitty on the "Prerogative," p. 43; *King* v. *Williamson*, 1672, Freeman, 39; *A. G.* v. *Weeden & Shales*, 1699, Parker, 267). In the United States it has been held by the Supreme Court that the confiscation of enemy property can be effected only by Act of Congress (*Brown* v. *U. S.* 1814, 8 Cranch, 110).

XV

DISCHARGE OF OBLIGATIONS BY THE AUTHORITY OF A FOREIGN SOVEREIGN

In addition to the cases already considered in which the jurisdiction of Courts is ousted by reference of the matter to the authority of a foreign sovereign, there is a question how far that authority may be regarded in cases affecting contractual rights. There may, of course, be a question whether what is alleged to be a contract really has that quality at all; and it may very well be that the dealings between a foreign Government and individuals, whether its own subjects or strangers, may merely simulate legal rights and belong to the sphere of public power (see for illustration of such a case, *Gladstone* v. *Ottoman Bank*, 1863, 1 H. & M. 505). But if it is once established that there is a right of a legal kind subsisting between justiciable parties, the matter appears to belong to the sphere of ordinary law, and can hardly be removed therefrom by the intervention of matter of State. *Prima facie* such matters stand entirely outside the domain of State affairs; the State is only

concerned in its judicial capacity as mediator, and the Courts of every State apply well established principles to the discharge of obligations. Of these principles the most important is that the proper law governing an obligation is that which alone is competent to give a discharge recognised exterritorially, and conversely a discharge under the proper law of a contract is universally recognised. This doctrine received a very striking application in *Jacobs* v. *Crèdit Lyonnais* (1884, 12 Q. B. D. 589, C. A.). In that case there was a contract whereby the defendants agreed to sell Algerian esparto to be shipped by defendants in plaintiff's ships at Algiers. The defendants were unable to fulfil their contract by reason of an insurrection which broke out in Algiers, and when sued for breach, pleaded the commands of military authorities preventing the collection and transport of esparto, and the actual impossibility owing to the state of the country of carrying out their contract. By the law of Algiers this would amount to *force majeure*, and would excuse non-performance. The Court of Appeal (Brett, M.R., and Bowen, L.J.) held that the only question was which law governed the contract, and coming to the conclusion that English was the governing law, upheld the plaintiff's demurrer.

There are, however, cases which may cause difficulty, as is shown by cases arising out of the confiscations of private debts by foreign Govern-

ments. If a foreign sovereign were to confiscate a debt due to British subjects, and an action were subsequently brought in our Courts against the foreign debtor, it may be assumed that he could not oust the jurisdiction by pleading matter of State; but would the confiscation discharge the debt, or otherwise affect its recovery? *Ogden* v. *Folliott* (1789, 1 H. Bl. 123; 1790, 3 Term Rep. 726) and *Wolff* v. *Oxholm* (1817, 6 M. & S. 92) are cases of that kind, but neither of them is very satisfactory. *Ogden* v. *Folliott* was an action brought in England upon a bond. An Act of New York, passed during the rebellion, had attainted the plaintiff, and confiscated his property for adherence to the British Crown. The defendant, who was also an attainted loyalist, relied on the attainder and confiscation of plaintiff's rights, and also upon the fact that his own confiscated property formed a fund which, according to the laws of New York, was available for local creditors, and to which, he contended, the plaintiff should have resorted, on the principle of *Wright* v. *Nutt* (1788, 1 H. Bl. 136). It will be noticed that the national character of the parties is the same; they are subjects of Great Britain, and both citizens of New York; and the obligation of the bond was clearly governed by the laws of New York. The Court of Common Pleas, considering the act of the State of New York to be of as full validity as that of any independent State, still held that it was penal in

character, and therefore merely local, and did not deprive the plaintiff of his right of action in England. The judgment was affirmed in the Court of King's Bench on Writ of Error. Buller and Grose, J.J., held, with the Common Pleas, that it fell within the principle that penal laws are local; while Lord Kenyon, C.J., and Ashurst, J., determined it on the ground that the act of New York was an act of rebellion against the Crown, and one which therefore must be treated as a nullity in any British Court. If the act had been one passed by an independent State at war with Great Britain, Lord Kenyon would have required further argument on the subject, for in that case he was "at a loss to know why all the property of those persons which was said to be confiscated did not pass to the executive power of that State to whom it was said to be forfeited; and why an action might not have been brought in the name of the executive power to enforce the payment of this bond; and how an action could have been brought in the name of the obligee" (p. 731). The answer to part of Lord Kenyon's difficulty seems to be that it is not within the province of our Courts to aid the warlike measures of an enemy, and that the enemy's acts of war cannot, either during the war or after, and whether in accordance with international law or not, receive their effectiveness from our Court; the case would be one fairly within the doctrine of act of State. (It would, of course, be different where the State

had reduced property of an enemy into possession within its own jurisdiction.) As to whether in such a case the obligee could sue on the bond, that question was determined in *Wolff* v. *Oxholm* (1817, 6 M. & S. 92). On the outbreak of war between England and Denmark, the latter required that all debts due by Danish to British subjects should be paid into the Danish Treasury. The defendant paid accordingly, and in an action in an English Court after the war, relied on that payment as a discharge. The King's Bench upheld the plaintiff's claim on the ground that the ordinance of confiscation was not conformable to the usage of nations, and that therefore the payment to the Danish Commissioners was no defence.

The reason given by the Court in *Wolff* v. *Oxholm* is not one which can safely be relied on; the balance of opinion, supported by far more of practice than the Court supposed, is in favour of the existence of the international right. But it may well be that, even though such acts of confiscation are not forbidden by international law, their penal character prevails, and calls for the application of the principle that all penal laws are regarded as local and territorial merely, itself an international principle.

Lord Ellenborough, in the course of his judgment in *Wolff* v. *Oxholm*, calls attention to a class of cases, relied on as precedents for the international right of confiscation, in which there

is no penal element. During war, it has not been uncommon for a State to direct payment to itself, not as a penal act of confiscation, but as a provident measure of policy "not less generous than lawful" whereby money due to foreign creditors is called in and kept by the Government during the war. An action against the debtor in such a case could not be supported on the ground that the foreign law was penal, and the payment could not be said to be contrary to international law. If the foreign country were the country of the obligation, there could be no reason against recognising the payment as a good discharge. If it were not the country of the obligation, a Court at the present day would probably hold that the payment was no defence, though Lord Kenyon and Lord Ellenborough would probably have taken a different view. The nature of the claim against the foreign Government, whether legal or moral according to its own laws, could hardly affect the question of the debtor's liability to his creditor; and as regards the effect of the debtor's payment, the question whether the foreign Government was really discharging the legal or moral obligations it had undertaken to creditors, would seem to be equally immaterial. The case of *Wright* v. *Nutt* (1791, 3 Brown, C. C. and 1 H. Bl. 136), suggests that if the payment was not a good defence the debtor might still have an equity to call on the creditor to exhaust his remedies against the foreign fund.

That also was a case of the confiscation of a loyalist's property during the American rebellion, and after the restoration of peace an American creditor chose to bring his action in England instead of resorting to the fund in America available for the satisfaction of his debt. The Court allowed the equity, and this was approved *obiter* by the Common Pleas in *Ogden* v. *Folliott.* Lord Eldon, however, in *Wright* v. *Simpson* (1802, 6 Ves. 740), expresses a strong opinion against it; and in any case the equity is not one which could be very fairly urged against a British creditor suing in the Courts of his own country.

XVI

ACTIONS BY FOREIGN SOVEREIGNS

It is a recognised doctrine that a foreign sovereign is under no disability as to asserting his rights in our Courts; for the rights which belong to him as an individual or to his State as a juristic person he may sue, and that though the right may have come to him by a title which could hardly exist in the case of a private person. *Hullett* v. *King of Spain* (1828, 2 Bligh, N. S. 31 H. L.), was a case in which the King of Spain filed a bill in equity claiming certain money in defendant's hands. It appeared that under the General Treaty of Paris (1815), to which all the great Powers were parties, France and Spain were to make certain payments to each other for the compensation of damage suffered by the subjects of each during the war. Subsequently, by a separate treaty, France and Spain varied this arrangement, and the French Government paid to one Machado, the Spanish agent at Paris, a very large sum of money. This money was, on the outbreak of civil war in Spain, carried to England. The Spanish Govern-

ment had meantime appointed a Board of Enquiry to investigate the claims, and instructed Machado to hold the fund at the disposal of this Board. Machado, however, handed over £200,000 to the defendants and left England. The defendants refused to acknowledge any authority save that of Machado, and the Spanish Government accordingly filed a bill against them. The defendants contended that it was not according to the Constitution of England that an English Court should be made instrumental in enforcing the prerogative of a foreign sovereign; and further, that the plaintiff's right was founded on a treaty made in fraud of a treaty to which Great Britain was a party, and in defeasance of rights to compensation to individuals arising under the first treaty. The House of Lords regarded these matters as immaterial; the case was simply one of an agent (Machado) having received money which belonged to his principal. As to the suggested rights of private persons upon the fund under the first treaty, they could take nothing save through their Government, and the Court had nothing to do with the question how the sovereign discharged the moral obligation upon it—"that the Spanish Government is a trustee for its own subjects may be true, but the Court of Chancery cannot properly enforce the trust."

While we recognise rights of a foreign Government in property or contract not less than we recognise those of private persons, the enforcement

of governmental powers is a very different matter. The foreign State as a juristic person may come into our Courts as plaintiff, but can the foreign State apply to our Courts to aid it in the maintenance of authority? The answer is that it cannot; that our Courts concern themselves with foreign rights when their aid is invoked against a justiciable defendant, whether those rights are public or private, but a foreign Government cannot extend its public powers into our territory and claim the aid of our Courts to enforce them. Thus, apart from statute, it is no offence to concert in England measures of hostility against a foreign Government; and the Court of Chancery would not interfere to prevent in England measures for the promotion of an insurrection in a foreign country (*per curiam Emperor of Austria* v. *Day & Kossuth*, 1861, 30 L. J. Ch., at p. 702). But the case just cited discloses a difficult question where the foreign Government is asserting a *right* indeed, but a prerogatival right not capable of existing in the ordinary subject, except so far as the sovereign delegates to him the exercise of the right in question. The case arose out of the measures projected by Kossuth in 1860, for a revolution in Hungary. One of these was the preparation of a note issue to the amount of over 100,000,000 florins, to be put into circulation in Hungary "upon the restoration of the laws and rights of Hungary," in substitution for the notes issued under the

authority of the existing Government. The plaintiff prayed a decree against the manufacturers for the delivery to the plaintiff of the plates used in the manufacture, and the "spurious notes," and an injunction against the delivery of any notes to Kossuth. The defendants admitted that a foreign sovereign might have relief in the Court where he sued in his public character to recover public property situated within the jurisdiction; but they insisted that what was in question in this cause, was not any right of property, but a mere "political right," a matter of State for political discussion, and not matter of right for judicial enforcement. Stuart, V.C., held on very broad grounds that the suit was maintainable. The ground of the plaintiff's claim was not a mere right of property dependent on municipal law, but a great public right, recognised and protected by the law of nations—"a public right recognised by the law of nations is a legal right, because the law of nations is part of the law of England" (p. 700); and in the application of this acknowledged principle, England had by statute enacted that the forgery or counterfeiting of the paper money of any sovereign was felony. There is "a general right of the sovereign authority in foreign States, to the assistance of the laws of this country, to protect their rights as to the regulation of their paper money, as well as their coin"; "the friendly relations between civilised countries

require for their safety the protection by municipal law of those existing sovereign rights recognised by the law of nations" (p. 700). These notes were inconsistent with any use save one which would be hostile to plaintiff, and were consequently unlawful. In other words, not only is this attribute of Hungarian sovereignty a *right*, recognised in our Courts, but it is an *a fortiori* case resting upon a definite obligation upon this country as a civilised nation. On appeal, the decree was affirmed, generally on much narrower grounds, though the members of the Court (Lord Campbell, L.C., Knight Bruce and Turner, L.J.J), deliver separate judgments disclosing distinct opinions. Knight Bruce, L.J., seems very nearly in accord with the Vice-Chancellor, as to the grounds upon which the injunction should go. The act of preparing for use and circulation in a foreign country in amity with England notes which purport to be issued by the Government, but are actually without the sanction of its Government, was wrongful by the law of England and the law of nations; and the recognised Government of that country was entitled to come into our Courts and ask for relief. This is broad ground, but it must probably be taken in connection with the explanation that the term "wrongful" in this connection means "civilly unlawful as regards rights of property, that is to say, public revenues, the fiscal resources, the pecuniary

means of the realm of Hungary, which means the plaintiff is entitled to represent here" (p. 709). Lord Campbell, L.C., considered that the language of the Vice-Chancellor led to the inference that if there were clear proof of munitions of war being kept and manufactured in England for the express purpose of fitting out warlike expeditions, the Court of Chancery would grant an injunction against the use of them, and would order them to be delivered up or destroyed. But the Court had no power to interfere merely to prevent a revolution, and the plaintiff's counsel had expressly repudiated any claim resting on the mere invasion of any prerogative of the plaintiff as a reigning sovereign, or on the notes being used to effect a revolution, or for any political purpose. It was only to prevent an injury to property that in a case like this the aid of the Court by injunction could be invoked (per Lord Campbell, L.C., p. 703). For instance, an injunction would not issue at the suit of the Pope to prevent the export to the papal dominions of books placed on the "Index Expurgatorius" (p. 707). Was a right of property disclosed in this case? The Lord Chancellor considered that there was such a right in the privilege of the plaintiff as sovereign to authorise a note issue, and in the fact that this right had been exercised by a concession to the National Bank of Austria, from which he obtained a profit. The bill disclosed, therefore, a property interest

of the plaintiff, which would be injured by this spurious circulation. The bank could, no doubt, maintain a suit for injunction for the damage to their property; and why not the Emperor on proof that a pecuniary wrong had been done to him (p. 706)? Turner, L.J., considered that it was not for the Court to intervene for the protection of the *jus cudendæ monetæ* of any foreign sovereign, though it was recognised as a prerogative of sovereignty by international law.

"The prerogative rights of sovereigns seem to me as at present advised to stand very much on the same footing as acts of State and matters of that description with which the Municipal Courts of this country do not and cannot interfere. Such acts and matters are recognised by international law no less than the prerogative rights of sovereigns, but the Municipal Courts of this country have disclaimed all right to interfere with them" (p. 711).

Impairments of sovereign prerogatives are the fit matter of representations to the State of which the offender is a subject. So far as the bill rested upon the prerogative rights of the plaintiff it appeared to the learned Lord Justice to fail. But the bill alleged injury to the private rights of the plaintiff's subjects; the effect of the introduction of these notes would be to deteriorate the value of the existing circulating medium, and thus to affect directly all the holders of

Austrian bank-notes, and indirectly, if not directly, all holders of property in the kingdom. These were sufficient grounds of property to found the jurisdiction of the Court. The plaintiff was competent to sue in a representative character on behalf of these rights of his subjects, and the bill might be construed in that sense.

The case is not a very satisfactory one in the absence of a clear agreed *ratio decidendi*. The representation of the separate property interests of subjects by the sovereign is novel, and is quite distinct from a suit for the property of the State itself, with which Turner, L.J., in his reference to the case before Lord Loughborough in 3 Ves. 481 (*Barclay* v. *Russell*), seems to confound it. It may be assumed that this representation is confined to suits in equity, and would not extend to the recovery of damages; and the decision seems hardly consistent with a case in Hobart, 78 and 113, *Don Diego* v. *Bingley*, in which the Spanish ambassador,[1] libelled in the Admiralty on behalf of all the King of Spain's subjects for damages for the piratical seizure of their goods on the high seas and conversion in Ireland. A prohibition issued from the King's Bench and the Ambassador then exhibited a bill in equity "as Procurator-General for all the King of Spain's subjects, and laid the goods to belong to the subjects of his master generally,

[1] The Spanish Ambassador was a very active litigant about this time (see cases collected in *Nabob of Carnatic's Case*, 1 Ves. Jr. 382-3).

without naming any persons certain." On demurrer, it was held that the Ambassador was not to be answered in the suit, for "(to omit that a procurator ought to sue in the name of his principal) no man can make a procurator for me but myself: therefore the King cannot make a procurator for all or any of his subjects without their allowance."[1] If the Emperor can sue for his subjects without their authority, it would seem to be in virtue of his political supremacy or prerogative as protector of his subjects. Surely this political capacity finds its appropriate sphere of action in diplomatic representations rather than in litigious proceedings in Courts of Justice. Again, the protection of property of subjects might be extended indefinitely, for every revolutionary proceeding threatening a violent disturbance of the Government of a country tends to depreciate property in the country in which it is to be carried out; and is it for an English Court to measure the extent of that depreciation? If the ground be shifted from the property of the subjects, to the property of the sovereign, the same objection seems to apply—that every revolution contemplates, and every revolutionary measure tends to some interference with the possession or control of national property by the existing Government. Further, if a plaintiff

[1] See also the remarks of Wood, V.C., in *U. S* v. *Prioleau*, 35 L. J. Ch. 7, cited *post*.

comes into Court to assert a proprietary right, he ought surely to show that that right exists by some municipal law; but in this case the Court declined to consider the contention that by Hungarian law, the right claimed by the plaintiff could only be exercised with the concurrence of the Diet, which had not been obtained (p. 704). The decision of the Court on this matter means, in fact, that the *jus cudendæ monetæ* is part of the sovereign power of every State, and that the Government which bears for international purposes the *persona* of the State must be deemed to have in it all the sovereign power of the State, regardless of the actual distribution of such powers made by the Constitution of the country. But it is submitted that, just because the regulation of the coinage and currency of a country is an essential attribute of sovereign power, it cannot be treated as even analogous to rights of property. In a struggle for supremacy it is one of the objects aimed at in the struggle, as well as a means of securing that supremacy. It may be that sound policy and international law require a State not to permit its territory to be made a base of operations against friendly Governments. But such a principle should be applied, if at all, directly, and not be cloaked under the protection of property. In any case, it is submitted, it is not for our Courts to apply such principles, unless they are, as in the Foreign Enlistment

Acts, empowered by the Legislature to do so.[1]

It seems clear that in German law no action can be brought to assert a right arising under the public law of a foreign country, unless it is of such a kind as is reducible to the ordinary rights of the civil, *i.e.* the private, law. But it is doubtful whether even in such a case a public right is actionable: Mayer, Droit Administratif Allemand, tome 1er, p. 142

[1] In the recent case *R.* v. *Brailsford* [1905], 2 K. B. 730, where the Court sustained a conviction for conspiracy to obtain a passport by false representations as to its intended use, the gravamen of the offence was the deceit practised upon the Secretary of State, and not merely the tendency of defendant's acts to embarrass the good relations between Great Britain and Russia, and their respective subjects.

XVII

SUCCESSION TO STATE RIGHTS AND LIABILITIES

Our Courts have been on several occasions called on to consider the effect of a change of Government on the rights and liabilities of a State. It is not proposed to consider here the general question as one of international law, but to deal merely with the aspect of these matters in Courts of Justice, a distinct though, no doubt, a connected matter. It seems always to have been acknowledged, at any rate in modern times, that upon a change of Government in a country, however affected, the new Government succeeds to all property and all rights of its predecessor situated or exercised within the territory under its authority. But in *Barclay* v. *Russell* (1797, 3 Ves. Jr. 423), Lord Loughborough seems to have been of opinion that it did not succeed in law to property situated in foreign parts, and that any claim thereto must be urged diplomatically, and not in any Court of Law. I think it clear that this was his opinion: that the matter was one to be settled between the

Governments of independent States, and that if there was any right by international law, it was not a right enforceable in any English Court. But Lord Eldon, in *Dolder* v. *Huntingfield* (1803, 11 Ves. Jr. 283), explained the decision in *Barclay* v. *Russell*, on the ground that the party originally entitled could not be regarded as a "foreign independent State," but was an English corporation dissolved by means which an English Court was bound to consider rebellion. The Court could not admit the principle that title passed to the American States by the act of rebellion. The suit was instituted by assignees of the State of Maryland, claiming certain stock which had been vested in the defendants as trustees for the Colonial Government of Maryland. The purposes of the trust were now exhausted, and the plaintiffs claimed by way of succession. Various interests were represented before the Court. The representatives of one of the trustees claimed to satisfy out of the fund the loss sustained by the confiscation of an estate in Maryland, and to this it was answered that such a claim gave rise to no lien against the fund; it was a "political injury with a political remedy." Another claim was made on behalf of the devisee of Lord Baltimore, the proprietary under Letters Patent from the Crown constituting the Colonial Government of Maryland. The assent of the proprietary was under the old system required

to all Acts of the Assembly, including any Acts disposing of this fund. The proprietary's claim was based broadly on the grounds that his rights were not affected by the recognition of independence, for the treaty being silent in respect to them must be taken to have preserved them; and any right of the new Government based on conquest must, of course, be restricted to what it could lay hold of in its own territory. To this claim it was answered that any right which the proprietary had was as part of the old Government, and when the old Government was gone, his claim was gone too. Another set of interests asserted that there was in the case of this Colonial Government constituted by Letters Patent from the Crown, a close analogy to a corporation; that by that analogy the Colonial Government was dissolved as a lawful institution from 1776, and that accordingly the trust funds belonged as *bona vacantia* to the Crown. Finally, the surviving trustee claimed that he was at equity as well as at law entitled in the absence of any better right shown. Lord Loughborough held that the treaty of 1783 recognised Maryland as independent from 1776, but it did no more—it granted or ceded nothing to the new State. Whatever was within the reach of the Acts passed, and the authority by which the Acts passed, the State must take; we must by virtue of the treaty consider them as Acts which we

had no right to dispute—they were binding whether just or unjust. But property belonging to the old colony as a political body situated outside its limits was not affected by the political acts of the State; it must be regulated by the law of the country where the property was situated. "No act they could have done in the character of an independent State could affect property not subject to their local jurisdiction;" that this was no peculiarity of their rebel status is shown by the Chancellor's mention of France, Spain, and Germany. The property now belonged to the Crown in consequence of the exhaustion of the trusts, and was free of any of the claims which had been asserted upon it. The parties who complained of the confiscation of their property by Maryland, had, no doubt, a moral claim against the State, which, however, was not one which an English Court could recognise as giving them a lien on this fund, even if it belonged to Maryland, *a fortiori* as it belonged to the Crown. The people of Maryland had some semblance of equity in their claim to the fund; but it was a political and not a judicial equity, and might in some sense be balanced by the political equities which had been urged against the State in the present case. But these were not questions for a Court of Justice.

Barclay v. *Russell* is now principally interesting for its exclusion of the suggested liens upon the fund in the case of those parties claiming against

confiscations by the State. Those matters are essentially political, not judicial. But it is now clearly established that the new Government upon a revolution or conquest succeeds in law to the rights of the old Government, though situated outside the subject territory. In *Dolder* v. *Huntingfield* (1805, 11 Ves. Jr. 283), the suit was brought on behalf of the Helvetic Republic for certain funds deposited in England in the hands of agents of the former Governments of the Cantons of Berne, Zurich, and Neuchâtel, which had been independent States, but had now become part of the Helvetic Republic. The defence was that the Cantons had ceased to exist, and that the plaintiffs were not their successors; for while a State can change its Government at pleasure, yet free will and consent are essential: "Nothing like force, conquest, or subjugation can give a title in a Court of Justice." Lord Eldon explained the decision in *Barclay* v. *Russell* on the grounds already stated, and declared that, as the dissolution of the old and the establishment of the new Government was no civil offence in this country, the cause was to be determined by the "great principles of the law of nations." Presumably that would have required the recognition of the title of the Government *de facto* to the national property, whenever that Government was recognised by this country; but the form in which the case was presented to the Court on this occasion made it unnecessary to determine the merits. The doctrine

is affirmed and acted upon by Kay, J., in *Republic of Peru* v. *Dreyfus* (1888, 38 Ch. Div. 348). It seems to follow from the recognition of the distinction between the sovereignty and the property of a State, and from the fact that law recognises States as juristic persons—a recognition doubted by Lord Loughborough in *Barclay* v. *Russell*, when he suggested for consideration the question whether a foreign sovereign could sue in our Courts.

A case which presents more difficulty is that in which the revolutionary Government has never attained to that permanence which warrants our Government in recognising it as the Government *de facto*. Such a Government has no *persona* which would enable it to sue or be sued in our Courts (*City of Berne* v. *Bank of England*, 1804, 9 Ves. 347); it cannot have either rights or obligations. Difficult situations may arise out of the acts of the individuals conducting the revolution, as where property of the State is brought to England during the conflict, and is held here by agents of the rebel Government—what is the position of the recognised Government as to the recovery of that property? Or the rebel Government has through its agents and with the public revenues of the country acquired property in England—what is the position of the recognised Government in relation to that property? In the case of the *King of the Two Sicilies* v. *P. & O. Company and Willcox* (1850,

19 L. J. N. S. 202), the facts show that in 1848 an insurrection took place in Sicily, and the new Government contracted through their agents for the purchase of certain ships from the defendant Company. One of the ships was delivered, and was paid for out of the public revenues of the country. In 1849 the royal Government was restored; and meantime the defendant Company, on the order of the agents of the insurrectionary Government, executed a transfer of the other ship to Willcox. The royal Government now prayed a decree against the delivery of the ship to any one but them, alleging that Willcox was a mere nominee of the late Government, and that the ship which had been purchased with the public revenues of Sicily must belong to the Government of Sicily. The defendant Willcox contended that the funds applied to the purchase must be regarded as property seized in war by right of conquest, and that there was no power in the tribunals of this country to restore property so acquired. Further, there was no privity between the Governments which would enable the royal to take advantage of the contracts of the insurrectionary Government. The plaintiff, on the other hand, contended that the money was the property of the State of Sicily, and that the Government of Sicily recognised by this country was entitled to recover its property in English tribunals; and treating the matter as one of contract, the restored Government might at its pleasure adopt or repudiate the contracts of the

intermediate Government. The Vice-Chancellor treated the case as a plain claim to property belonging to the Government of Sicily, and therefore recoverable by the plaintiff.

In that case the conflict had been brought to an end when the suit was brought. If the suit had been brought while the conflict was in progress the matter would have been more difficult. It would certainly not have been a case in which the Court could have applied the doctrine of succession; but it could still be argued—This is the proceeds of property belonging to the State, which the recognised Government is entitled to represent, and a Court cannot look at the political situation. Probably, however, notwithstanding the tenderness of Courts for the rights of property, our Courts would decline to entertain an action in such a case, on the grounds that the acts, being incidental to a political disturbance, were outside the competence of Municipal Courts: that the *animus belligerandi* invested them with a public character.

The two cases considered in the English Courts arising out of the war of Secession in the United States are especially interesting, because the decision in both rests upon the successory title of the restored Government to the rights there in question.

In *U. S.* v. *Prioleau* (1866, 35 L. J. Ch. 7), the plaintiffs sued after the conclusion of the war in respect of certain cotton consigned to England for sale for the benefit of the Confederate Govern-

ment, and moved for an injunction to restrain any dealing with the cotton otherwise than by their order. The defendants did not seriously contest the interest of the United States in the matter, but claimed that they were entitled as against the plaintiffs to all rights which they had against the Confederate Government, and set up a lien for moneys due to them. Wood, V.C., held that the United States title was one of succession, and that they succeeded to property as they found it. If the Confederate Government was to be ignored and the property treated as the property of the present plaintiffs throughout, then there seemed no reason why a bill should not have been filed to compel those in charge of the *Alabama* to give her up when she was flying her flag as a ship of war in British waters. And if the confederates were mere marauders and robbers, it would not be for the United States, but for the individuals who had been robbed, to come in as plaintiffs—the United States could not sue for the owners. The United States could only come in and claim this fund because it had been raised by public contribution; it would not be public property unless it was raised by an exercise of the rights of Government, and not by means of mere robbery or violence.

In *U. S.* v. *M'Rae* (1867, L. R. 4 Eq., 327; 3 Ch. 79, and 1869, L. R. 8 Eq., 69), the plaintiffs proceeded against the agent of "the pretended Confederate Government during the late insurrec-

tion" for an account of all money which came to his hands in that capacity. The defendant pleaded proceedings in the United States for the confiscation of his property on account of his part in the insurrection, and relied on this plea both as an answer to a claim for discovery and in bar of the relief. Page Wood, V.C., sustained the plea on both heads—the defendant was not to be compelled to give discovery of facts which would assist the confiscatory proceedings against him in the United States, and the plaintiffs could not in any case maintain this suit except by waiving the forfeiture—he who seeks equity must do equity. On appeal, the Lord Chancellor (Lord Chelmsford) held that the plea was good as to the discovery, but bad as a bar to the relief. The case ultimately came on for hearing before Vice-Chancellor James. The claim of the United States applied to (1) money and goods originally the property of the United States and seized; (2) money and goods contributed by individuals or raised as revenue by the Confederates; and (3) money and goods of private persons seized by the rebel Government. The Vice-Chancellor held that there was no proof that any money or goods of the plaintiff within class (1) ever reached the hands of the defendant. For the rest, the plaintiffs were entitled, but only by way of succession to the Confederate Government; their right was a right of representation, not paramount, but derived through the suppressed and displaced authority,

enforceable only in the same way and to the same extent and subject to the same correlative obligations and rights as if that authority was itself seeking to enforce it. The account, therefore, must be taken as between the Confederate Government and its agents; but as the plaintiffs declined to accept the decree in any form which would recognise the authority of the belligerent States or involve any payment to their agent, the bill was dismissed.

In disposing of the first claim—to money and goods originally property of the United States and seized by the Confederate Government—James, V.C. uses language which, taken by itself, is open to misconception. At p. 74, he says:

"The money, goods, and treasure which were at the outbreak the public property of the plaintiffs, and which were seized by the rebels, still continued their money, goods, and treasure, their rights of property and rights of possession being in no wise divested or defeated by the wrongful seizure of them."

This language, it is submitted, is referable only to the hypothesis upon which the Vice-Chancellor dealt with the case, treating it as equivalent to an action brought by the Indian Government against those who were in possession of property of the Government which had been seized by the rebels during the Mutiny. The actual situation was very different, and the legal predicament in an English Court arising from a suppression of

a rebellion by the Government of India, whose property had been seized by rebels against the Crown, is essentially different from that which exists on the suppression of a rebellion against the Government of a foreign country where the rebel Government has been recognised as a belligerent community whose acts of war are not the acts of marauders, but the exercise of belligerent rights. The Lord Justice only contemplates the case of an action brought after the restoration of the Government. But it is submitted that so far as concerns moveable property, capture is a good title in the case of lawful belligerents, and that the restored Government could only stand in the shoes of the belligerents, and would be bound by any interests which they had created.

The remaining cases on the subject are the *Republic of Peru* v. *Peruvian Guano Co.* (1887, 36 Ch. Div. 489), and *Republic of Peru* v. *Dreyfus Bros.* (1888, 38 Ch. Div. 348). In the first case, the plaintiffs had contractual claims against the defendant; a revolutionary Government recognised by Great Britain compromised the claims and received a large sum of money in discharge thereof; and finally another Government, claiming to be duly constituted under the laws of Peru, repudiated the compromise, and brought an action on the original claims. *Held*, that the Government was bound by the acts of their predecessors, and could not repudiate. In *Republic of Peru* v. *Dreyfus*,

upon similar facts, Kay, J., held that the case did not depend upon the validity of the acts of the insurrectionary Government according to the law of Peru; unless people could treat the established and recognised Government of a State as the lawful Government there could be no safety in dealings with any foreign Government. The only way in which the agreement could be impugned was by showing that those who made it were not the Government of Peru; and that was settled, not by the law which the Government of Peru subsequently established, but by the actual recognition of the Government as the *de facto* authority. It is interesting to note that the recognition which was in this case regarded as material was the recognition by the French Government, the defendants Dreyfus being French citizens.

These cases establish, first, that the Government of a foreign State may come into our Courts to assert rights acquired by an usurping authority, whether that authority was recognised by our Government as the lawful Government of the State, or merely as a belligerent community, or even if the usurping Government was never recognised at all. Secondly, that it does so as a successor merely, and therefore subject to any rights which could be asserted against the usurping Government. The difference in the status of the several rebel Governments appears to be this. In the case where the usurping Government was

recognised by our Government, the usurper's rights would be deemed to have extended to property situate in our own or any foreign jurisdiction, and the restored Government would, in regard to such property, be a successor merely. A mere belligerent community or an unrecognised rebel would have had no title to the property of the State situate abroad. As already suggested, the belligerent community would have had a good title to any property which it had laid hold of by belligerent right; and it has been submitted that even in the case of unrecognised rebels, property, or the proceeds of property, seized *flagrante bello* and brought into our jurisdiction could not during the conflict have been recovered in our Courts.

It is, of course, only when the foreign Government has voluntarily submitted itself to our jurisdiction, that claims of this kind can arise. In the preceding cases the foreign Government had submitted by coming in as a plaintiff.

It is clear that the obligations subject to which the foreign Government succeeds to the rights of its predecessor must correlate legal rights, and not rights binding merely in conscience or even in international law, as between States. In *Barclay* v. *Russell* the "equities" arising from the confiscation of the trustee's property by the Government of Maryland were not treated as legal claims which could be set against any right that Government might have to the fund in question.

It has been already pointed out that the Petition of Right in English law is a means of enforcing against the Crown only those rights which exist at law; and it is in accord with a principle, familiar in more than one department of law, that where, by cession or conquest, the Crown acquires new territories, the mere change of persons would not transform a moral into a legal obligation. This doctrine is illustrated by *Doss* v. *Secretary of State for India* (1875, L. R. 19 Eq. 509). In that case there were contractual claims of several creditors of the King of Oudh, which had arisen long before the British annexation of Oudh in 1856; and these claims were now presented against the British Government, represented by the Secretary of State for India in Council. Among the grounds upon which Malins, V.C., held that the claim was not maintainable, was that at the time of the annexation the plaintiffs had a debt which "in a court of conscience and justice ought to have been paid, but for which they were absolutely without remedy" (p. 530), and while admitting that a State took new territories subject to the obligations thereof, the Vice-Chancellor held that there was nothing in the annexation to throw upon the East India Co. a legal obligation which did not exist in law against the sovereign power from whom they wrested or took these territories (p. 531).

Where, however, the claim was one which existed under the law of the country annexed,

and could have been prosecuted against its Government, and is also of such a character that if it were under our law it might be the subject of a Petition of Right, the case falls within another principle. In *Doss* v. *Secretary of State*, the Vice-Chancellor deals with this matter also, and it is one of the grounds of his decision that where such obligations arise out of the annexation, an act of State, they do not correlate rights which any Municipal Court can enforce. The claim, it will be noted, was not one of the foreign sovereign, which would be clear matter of State, but that of a creditor upon a contract. The judgment treats the annexation as effecting a transformation of the legal rights into a moral right, or into a right existing under international law, but in either case not cognisable in Municipal Courts.

The whole question of the liability of the Crown for the contractual obligations of a State annexed by Great Britain was raised and decided in the recent case of the *West Rand Central Gold Mining Co.* v. *The King* (1905, 21 Times Law Reports, 562 [1905], 2 K. B. 391). The claim was by Petition of Right for a large amount of gold seized by the Transvaal Government just before the outbreak of war. The Attorney-General demurred on the ground that the case did not disclose any obligation upon the part of His Majesty towards the suppliants, or any legal or equitable right of the suppliants against His Majesty, cognisable by the

Courts of this country, or enforceable therein. The case might, it would appear, have been disposed of on the ground that the act of the Transvaal Government was a mere lawless seizure giving rise to no legal remedy against the Crown, or that it was an act of power creating no right against the Transvaal Government. But the case was by agreement treated as though the obligation arose by contract, and (*semble*) such obligation could have been enforced against the Transvaal Government by appropriate proceedings in its own Courts. The claim was based on the ground that by international law a conquering State is liable for the obligations of the conquered, that international law is a part of the law of England, and that the rights and obligations which were binding on the conquered can be enforced in the Courts of the conquering State. The Court held that the first proposition was unsound; that, on the contrary, a conqueror could determine for himself to what extent he would adopt them; and that it was a case in which the only law was military force. Convention or proclamation might make repudiation an act of bad faith, but there was no law which declared that the conqueror adopted obligations whenever he did not expressly repudiate them. Treaties by which a conqueror specially undertook some part of the debt of the ceded territory were evidence not of the existence of an obligation, but of the absence of such obligation unless undertaken

by treaty, and even the opinions of jurists, which the Court was by no means ready to accept as authoritative, did not go the length of the suppliant's contention — that annexation made the debts of the former State obligations of the new sovereign. But these doctrines were inapplicable in an English Court by reason of settled rules of English law as to the *status* of conquered territories which with the enemy subjects were at the King's mercy (*Campbell* v. *Hall*, Cowper, 209, and the Memorandum in 2 Peere Williams, 75). The Court makes two distinctions, which may in the future have important consequences. First, the Court distinguishes the case of cession from that of conquest:

"The considerations which apply to peaceable cession raise such different questions from those which apply to conquest that it would serve no useful purpose to discuss them in detail" (p. 567).

Secondly, the Court clearly distinguishes between the position of the property of the new subjects which is of right unaffected by the change of sovereignty and mere contractual claims against the Government:

"It must not be forgotten that the obligations of conquering States with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract" (p. 568).

As to the former, the Court appears to adopt the principle of the United States cases, which support the validity of the titles against the United States Government; as to the latter, they had not been referred to any case in which a similar principle had been applied to personal contracts or obligations of a contractual nature entered into between a ceding or conquered State and private individuals. One may probably infer from this that, when the Court "observes in passing" that it is "not to be considered as throwing any doubt upon the correctness of the decision itself in *Cook* v. *Sprigg*," it treats that decision as belonging in substance to the sphere of obligations, and not to that of property, the solution of the difficulty suggested in an earlier part of this essay. At the same time, however, the Court cites with approval the broadest of the dicta in *Cook* v. *Sprigg*,[1] that "a change of sovereignty ought not to affect private property but no municipal tribunal has authority to enforce such an obligation," a view which it is not easy to reconcile with their apparent acceptance of the decisions of the Supreme Court of the United States on the subject of property. It may, of course, mean that the difference between the cases of property and contract amounts to no more than this—that contracts do not require to be disavowed by the new State, since the obligation does not pass, while in the case of

[1] 1899, A. C. 572.

property, the title remains until it is extinguished by the conqueror's exercise of his absolute power over the conquered, a power which it has been already suggested can hardly be extended to peaceful cession. But in the United States it is clear that nothing short of a legislative could alter those "modern usages of civilized nations which have acquired the force of law," and which secure their property to the new subjects of a conquering or cessionary sovereign. See in addition to the cases cited in the *West Rand Case*, the case of *U. S.* v. *Repentigny* (1866, 5 Wallace, 211, 260), where a distinction is drawn as to property rights in the new territory between those persons who are citizens under the annexation and whose rights of property remain unaffected as against the Government, and those who remain aliens, and consequently must stand only upon any protection which is given them by the treaty.

Taking it as now established, that a cession of territory to the Crown or the conquest and absorption of a foreign country, does not make the Crown liable by way of succession to the legal obligations of the former State, so as to make the Petition of Right available for their assertion in our Courts, it is interesting to consider how far this principle extends. It may be that the obligation, though transformed into a non-legal obligation, remains as an inchoate liability which can be restored to the condition of a legal

obligation by some act of adoption on the part of the Crown. If, however, it has become a pure matter of State, outside law altogether, it would rather appear that the obligation could not be adopted, and that nothing but a new contract with all the essentials of a contract, could call an enforceable obligation into existence. This may well become of importance in relation to cases in which our Government is placed in a position analogous to that of the United States in *U. S.* v. *Prioleau* and *U. S.* v. *M'Rae*. It cannot be doubted that the Crown has acquired all the property of the preceding State or Government, and that it may avail itself of all rights which existed at law in favour of the late Government; the annexation, no doubt, is an act of State, but that act is the foundation of juristic consequences. In suing a debtor of, say, the South African Republic in a British Court, can the Crown recover the debt in full without giving credit for such rights as the debtor would have had against the Government of the Republic? The cases of *U. S.* v. *Prioleau*[1] and *U. S.* v. *M'Rae*[2] suggest that while the conquering or annexing State may elect whether it will adopt the legal rights of its predecessor, if it does adopt them, it does so as successor merely, and therefore subject to burdens. But those are cases in which the succeeding Government had

[1] 1866, 35 L. J. Ch. 7, 79; and 1869, L. R. 8 Eq. 69.
[2] 1867, L. R. 4 Eq. 327; 3 Ch.

to resort to the Courts of a foreign country to enforce that which was beyond its own power. It does not necessarily follow that a sovereign resorting to his own Courts is in a similar predicament; and *Doss* v. *Secretary of State*[1] and the *West Rand Central Gold Mining Co.* v. *The King*[2] emphasising the mere state or political character of the matter, point rather towards treating such claims as binding merely on the conscience of the Crown. However, in the *West Rand Case*, the Court observes that *Prioleau's* and *M'Rae's* cases are substantially different from that before the Court, and it is probable that the decision is not to be regarded as an expression of opinion against the application of the principle of those cases where the Crown is plaintiff. In regard, at any rate, to matters which are substantially part of the same transaction or series of transactions, it is submitted that the Crown will not be allowed to approbate and reprobate; that if it avails itself of the rights of the preceding Government, it will do so as successor, and subject to any right of the other party which was legally enforceable against the old Government, and is of a kind which, apart from the complications arising from annexation, would be enforceable against our Government.

[1] 1875, L. R. 19 Eq. 509.
[2] 1905, 21 Times, L. R. 562; [1905] 2 K. B. 391.